

CRIMINAL LAW

THE GENERAL PART

Carlson Anyangwe



VISIT...

LANZAROTE
Caliente.COM

CRIMINAL LAW *THE GENERAL PART*

Carlson Anyangwe



Langa Research & Publishing CIG
Mankon, Bamenda

Publisher

Langaa RPCIG

Langaa Research & Publishing Common Initiative Group

P.O. Box 902 Mankon

Bamenda

North West Region

Cameroon

Langaagrp@gmail.com

www.langaa-rpcig.net

Distributed in and outside N. America by African Books Collective

orders@africanbookscollective.com

www.africanbookscollective.com

ISBN: 9956-762-78-4

© Carlson Anyangwe 2015

All rights reserved.

No part of this book may be reproduced or transmitted in any form or by any means, mechanical or electronic, including photocopying and recording, or be stored in any information storage or retrieval system, without written permission from the publisher

Table of Contents

Table of Cases.....	xiii
Table of Instruments.....	xxvii
Preface.....	xxix

Part I. Introduction: Historical Development of the Criminal

Law.....	1
-----------------	----------

Chapter 1 Crime and Society..... 3

Section 1. The concepts of ‘crime’, ‘offence’, ‘criminal law’, and ‘penal law’.....	4
§1. ‘Crime’ and ‘offence’.....	4
§2. ‘Criminal law’ and ‘penal law’.....	9
Section 2. The phenomenon of crime.....	10
§1. Crime as a permanent aspect of human society.....	10
§2. Criminal law and related disciplines.....	11

Chapter 2. Criminal Justice in Early Society..... 15

Section 1. Un-institutionalised criminal justice and early criminal ‘codes’.....	15
§1. Self-help punishment.....	15
§2. Early criminal ‘codes’.....	17
Section 2. Institutionalised criminal justice system.....	20
§1. Early tribunals.....	20
§2. Bases and forms of punishment.....	23
§3. The early prison.....	25

Chapter 3. History of European Thought about Crime..... 27

Section 1. The classical school of criminal justice philosophy.....	27
§1. Mild but certain and unavoidable punishment	28
§2. Promptness of punishment.....	28
§3. Principle of legality of crimes and punishment.....	29
§4. Crime and punishment to be based solely on harm to society.....	29
Section 2. The neo-classical school of criminal justice Philosophy.....	32
§1. Judicial discretion in sentencing.....	32

§2. Justice and utility as the bases of punishment.....	33
§3. Sociological and anthropological trends in the study of crime.....	33
§4. Application of statistical method to the study of crime: the cartographic school.....	34
Section 3. The Italian positivist school.....	35
§1. Main ideas espoused.....	36
§2. Leading exponents – Lombroso and Ferri.....	37
Section 4. The social defence school.....	39
§1. Basic idea: social defence through reform of offenders.....	39
§2. Chief proponents.....	39
Section 5. The new social defence school.....	40
 Chapter 4. ‘Reception’ of Exotic Law.....	 43
 Section 1. Colonial period.....	 44
§1. Legal system.....	44
§2. The general law.....	45
Section 2. Post-colonial period.....	50
§1. Body of law in force.....	50
§2. Codification of the criminal law.....	51
 Part II. Application of the Criminal Law.....	 57
 Chapter 5. The Principle of Legality: A Safeguard of Individual Liberty.....	 59
 Section 1. Source, scope and rationale of the principle.....	 60
§1. Source	60
§2. Scope and rationale.....	64
Section 2. Implications of the principle.....	66
§1. For criminal law legislation.....	66
§2. For criminal law policy	68
§3. For law application	69
Section 3. Criticism of and inroads into the principle.....	70
§1. Criticism.....	70
§2. Inroads.....	70
 Chapter 6. The Principle of Legality: Sources of Criminal Law; Judicial Oversight.....	 71
 Section 1. Sources of the rules of criminal law.....	 72
§1. The Constitution.....	72

§2. International law	72
§3. Statute.....	76
Section 2. Role of the courts.....	78
§1. Judicial control of the constitutional validity of criminal legislation.....	78
§2. Judicial interpretation of criminal legislation	85

Chapter 7. The Principle of Legality: Taxonomy in Criminal Law... 93

Section 1. Classification of offences	93
§1. By mode the of commission of the offence	93
§2. By the presumed objective gravity of the offence.....	97
§3. By the nature of the offence.....	99
Section 2. Determining and framing the appropriate charge	102
§1. Framing the formal written accusation.....	102
§2. Multiple-offence situations: duplicity and misjoinder.....	106

Chapter 8. The Principle of Non-Retrosection: Application of the Criminal Law in Time..... 119

Section 1. Statement of the basic principle.....	119
§1. Criminal legislation not applicable to acts prior to its entry into Force.....	120
§2. Ongoing criminal trial not affected by change in the law.....	123
Section 2. Extensions and justification of the Principle.....	124
§1. New less severe criminal law has retrospective effect.....	124
§2. New preventive measure has retrospective.....	127
§3. Effect of abolition of an offence.....	128
§4. Justification for the principle.....	129

Chapter 9. The Principle of Territoriality: Application of the Criminal Law in Space..... 131

Section 1. Territorial Jurisdiction.....	132
§1. The territorial principle – general rule.....	132
§2. The territorial principle – exceptions	135
Section 2. Personal Jurisdiction.....	138
§1. Jurisdiction over nationals wherever they may be.....	139
§2. The protective principle.....	142
§3. The universality principle.....	143
§4. Crimes under international law.....	144
§5. Limitations on the exercise of personal jurisdiction.....	145
Section 3. Principle of exclusivity of municipal criminal law.....	152
§1. Exclusion of foreign criminal law.....	152

§2. Effect of foreign criminal judgments	153
§3. Execution of foreign judgments.....	155

Chapter 10. The Principle of Territoriality: Mutual Co-operation between States in Criminal Matters..... 157

Section1. Interpol and mutual assistance between states in criminal matters	160
§1. Interpol.....	161
§2. Mutual assistance in criminal matters.....	163
Section 2. Extradition.....	164
§1. General principles governing extradition	166
§2. Extradition procedure.....	169
Section 3. Rendition and asylum.....	171
§1. Rendition.....	171
§2. Asylum.....	171

Part III. Criminal Responsibility..... 173

Chapter 11. The Mental Elements of an Offence: Intentional Fault..... 175

Section 1. Relevance of English doctrine of <i>mens rea</i> under the Penal Code	176
§1. The doctrine ceased to be relevant	177
§2. The doctrine continues to be relevant.....	177
Section 2. Overview of the principle of criminal responsibility.....	180
§1. Intention (including its semantic equivalents) and other fault Elements.....	181
§2. Act, omission, circumstance, consequence.....	182
§3. Ascription and imputability.....	183
Section 3. Meaning of intention in criminal law.....	184
§1. Intention as to each ingredient act, omission, or consequence	185
§2. Intention as to the prohibited specified circumstance.....	186
§3. Proof of intention	189
Section 4. Cognate concepts: premeditation, transferred intention, etc.....	189
§1. Premeditation	189
§2. Ulterior intention	190
§3. Specific intent and basic intent	191
§4. Transferred intention.....	191
Section 5. Motive.....	197

§1. Motive and intention distinguished.....	197
§2. Motive is generally irrelevant.....	201
§3. Motive is relevant in certain instances.....	201
Section 6. Ignorance of the law and mistake of fact.....	203
§1. Ignorance of the law	203
§2. Mistake of fact	208

Chapter 12. The Mental Elements of an Offence:

Non-intentional Fault.....	211
-----------------------------------	------------

Section 1. Unintended consequence as fault element:

‘unintentionally’.....	212
§1. Meaning of ‘unintentionally’.....	212
§2. Offences in which ‘unintentionally’ is the requisite fault element.....	213

Section 2. Course of conduct as a fault element:

‘Negligently’, ‘carelessly’, ‘rashly’.....	214
§1. ‘Negligently’.....	215
§2. ‘Carelessly’	218
§3. ‘Rashly’.....	220

Section 3. Deception as a fault element:

‘Dishonestly’, ‘falsely’, ‘fraudulently’.....	224
§1. ‘Dishonestly’.....	225
§2. ‘Falsely’.....	225
§3. ‘Fraudulently’	226

Chapter 13. The Physical Elements of an Offence:

Act, Omission, etc.....	227
--------------------------------	------------

Section 1. Act and omission.....

§1. Act.....	228
§2. Omission.....	229

Section 2. Events and surrounding circumstances.....

§1. Events	234
§2. Surrounding circumstances.....	234

Section 3. Legally-relevant consequence and the problem

of causation.....	234
--------------------------	------------

§1. Consequence.....	235
§2. Causation.....	235

Section 4. Concurrence of physical and mental elements

§1. The general rule – coupling of intention and conduct.....	237
§2. Qualification on the general rule.....	238

Chapter 14. Defences of General Application: Absolute Defences....

Section 1. Insanity	248
§1. Formulation of the insanity defence.....	250
§2. Procedural aspects	264
Section 2. Intoxication	269
§1. Voluntary intoxication generally not a defence.....	270
§2. Self-induced intoxication a defence in intentional crimes.....	272
§3. Involuntary intoxication a defence where effect is the same as insanity	272
Section 3. Childhood	273
§1. Persons under ten years of age.....	274
§2. Persons between ten and fourteen years of age.....	275
Section 4. Threats	276
§1. Threat of death or grievous harm.....	277
§2. Unavoidable threat.....	277
§3. Threat of immediate harm.....	278
§4. Absence of voluntary exposure to risk of threat.....	278
Section 5. Accident	279
§1. Meaning of accident.....	279
§2. Illustrations.....	279
§3. Basis of the defence of accident.....	281
Section 6. Irresistible physical compulsion	283
§1. Requirements	283
§2. Sane automatism.....	283
§3. Interest in distinguishing between automatism and insanity.....	285
Section 7. Obedience to lawful authority	286
§1. Competent authority.....	286
§2. Authority to whom obedience is lawfully due.....	287
§3. Where order manifestly unlawful.....	287
Section 8. Lawful defence	290
§1. General remarks	290
§2. Requirements for the defence to succeed.....	292
§3. Defence of property	298
§4. Burden of proof	298
Section 9. State of necessity (duress of circumstances)	299
§1. Explication.....	300
§2. Proportionality of means of protection.....	302
 Chapter 15. Defences of General Application: Partial Defences	 307
 Section 1. Partial insanity and partial intoxication	 307
§1. Partial insanity.....	307
§2. Partial intoxication	308
Section 2. Infancy: children aged 14 to 18	308

§1. Conviction followed by a reduced sentence	309
§2. Ancillary court orders.....	309
Section 3. Respect.....	310
§1. A moral-compulsion defence.....	310
§2. May be urged as an absolute defence under ss. 77 and 83	310
Section 4. Threats: proviso to section 81 (1) (duress by threats).....	310
§1. Rationale for duress by threats as only a partial defence	311
§2. Limited scope of this partial defence	311
Section 5. Provocation.....	312
§1. Unlawful act	312
§2. An offence immediately provoked.....	314
§3. Reaction to be proportionate to provocative act	316
§4. Illustration of proportionality	317
§5. Loss of self-control	323
 Part IV. Participation in Crime.....	 325
 Chapter 16. Principal and Secondary Offenders.....	 327
Section 1. Principal Offenders.....	327
§1. Sole principal offender.....	327
§2. Joint principal offenders (co-offenders).....	329
Section 2. Secondary Offenders: accessories.....	336
§1. Meaning of accessory.....	336
§2. Accessory before the fact.....	337
§3. Accessory at the time of the fact.....	340
§4. Accessory after the fact	343
§5. Accessory to the preparation of a felony or misdemeanour	345
Section 3. Principles governing punishment of co-offenders and accessories.....	345
§1. Accessory and co-offender punishable ‘in like manner’ as the principal offender.....	345
§2. Effect of personal and foreseeable circumstances.....	350
§3. Liability for foreseeable consequences	351
§4. Theoretical bases for punishing complicity.....	353
 Chapter 17. Inchoate Crimes: Attempt.....	 357
Section 1. Meaning and ingredients of attempt.....	360
§1. Meaning of attempt.....	360
§2. Ingredients of attempt.....	361
Section 2. Scope of the law of attempt.....	364

§1. Law of attempt confined to serious crimes.....	364
§2. Preparatory acts generally not indictable as attempt.....	365
Section 3. Where preparatory acts end and attempt begins.....	367
§1. The objective and subjective tests.....	368
§2. The unequivocal test	370
Section 4. Attempting the impossible.....	375
§1. Impossibility of law.....	376
§2. Impossibility of fact.....	376
§3. Inadequacy of means or methods.....	376
Section 5. Punishment for attempt.....	378
§1. Attempt punishable in the same way as completed offence.....	378
§2. Rationale for punishing attempt	379

Chapter 18. Inchoate Crimes: Conspiracy, Dangerous Preparations and Attempted Abetment..... 381

Section 1. Conspiracy.....	381
§1. Meaning	382
§2. Ingredients	383
§3. Some specific issues relating to the law of conspiracy.....	388
§4. Husband and wife immunity for conspiracy.....	389
§5. Interruption of execution of the contemplated offence	391
§6. Joint voluntary abandonment of the conspiracy.....	393
§7. Conspiracy and attempt distinguished	393
Section 2. Dangerous preparations and attempted abetment.....	394
§1. Dangerous preparations.....	394
§2. Double inchoate crime: attempted abetment.....	396

Chapter 19. Corporate, Vicarious and Strict Liability..... 399

Section 1. Corporate criminal liability.....	399
§1. Historical	400
§2. Extent of corporate criminal liability generally.....	401
§3. Extent of corporate criminal liability under the Penal Code.....	403
§4. Theoretical bases and justification of corporate criminal liability	404
§5. Punishing the convicted corporate offender.....	406
Section 2. Vicarious criminal liability.....	407
§1. Silence of the Penal Code on the subject	407
§2. Concept of vicarious liability.....	409
§3. Legislative language imposing vicarious liability.....	409
§4. Liability based on principles of ‘extensive construction’ and ‘delegation’	410
§5. Recourse to concept of vicarious liability	411

Section 3. Strict Liability in criminal law.....	412
§1. Concept of strict liability.....	413
§2. Strict liability an anomaly in criminal law.....	415
§3. Strict liability arises mostly in cases of summary offences.....	416
§4. Criteria for determining strict liability offences	417
§5. Raisons d'être for strict liability offences	419
§6. Relevant defences	420
 Part V. Criminal Disposal.....	421
 Chapter 20. Rationales of Punishment.....	423
 Section 1. Retribution	425
§1. Legal revenge	425
§2. Just desert.....	425
§3. Expiation.....	427
Section 2. Prevention.....	427
§1. Deterrence	427
§2. Incapacitation	431
§3. Rehabilitation	432
Section 3. Restoration and reparation	433
§1. Right of victims of crime.....	434
§2. Restorative justice.....	435
§3. Restitution, confiscation and forfeiture.....	436
§4. Compensation	438
 Chapter 21. Penalties and Preventive Measures.....	441
 Section 1. Penalties.....	442
§1. Principal penalties.....	442
§2. Accessory penalties.....	449
Section 2. Preventive Measures.....	454
§1. Ante-penal preventive measures.....	455
§2. Post-penal preventive measures.....	457
 Chapter 22. Sentencing: Judicial Discretion and Decision.....	461
 Section 1. Discretionary decision-making in the criminal process....	442
§1. Prosecutorial discretion.....	462
§2. 'Dubious' prosecution practices.....	463
Section 2. Source of sentencing law.....	464
§1. Legislation.....	464

§2. Guideline judgments.....	465
Section 3. Rules governing sentencing decision.....	466
§1. Sentence must be lawful.....	467
§2. Sentence must be proportionate.....	473
§3. Sentence must be individualised.....	479
 Chapter 23. Sentencing: Circumstances Affecting Term of Sentence.....	 481
 Section 1. Multiple convictions: concurrent and consecutive sentences.....	 481
§1. Concurrent sentences.....	484
§2. Consecutive sentences and their enforcement.....	495
Section 2. Commencement and calculation of custodial Sentence.....	497
§1. Commencement of sentence.....	497
§2. Calculation of custodial sentence.....	497
Section 3. Mitigation and aggravation of punishment.....	500
§1. Aggravation of punishment.....	500
§2. Mitigation of punishment.....	502
Section 4. Modification of sentence: suspension and remission of sentence.....	503
§1. Suspension.....	504
§2. Remission.....	510
 Chapter 24. Expungement of Conviction.....	 515
 Section 1. Rehabilitation.....	 515
§1. Automatic rehabilitation.....	516
§2. Court-ordered rehabilitation.....	517
Section 2. Amnesty.....	518
§1. Historical.....	518
§2. Meaning and effect of amnesty.....	518
§3. Amnesty, pardon and rehabilitation distinguished	520
 Bibliography.....	 521
 Index.....	 525

Table of Cases

A

Abdu Yakubu v The People (1975) Criminal Appeal, BCA/32c/75, unreported	122
Abley v. Dale (1851) 11 CB 378, 391	87
Adams v Camfoni [1929] 1 KB 95	409
Affaire Lacour, 25/10/1962; Dalloz 1963, p. 221, Note Bouzat	366
Affaire Ménard (1899), D.P. II. 329, note Josserand; S. 1899. II. 1, note Roux	301
AG Federal Court of Justice v. Thomas Mbeng Mbeng (1968) WCLR 83	126
A-G for Northern Ireland v. Gallagher [1961] 3 All ER 299	271
Airedale National Health Service Trust v Bland [1993] 1 All ER 821.....	6
Aliyo Lahpana Ndimasa v The People (1968-1970) UYLR 19	190, 320
Allan [1965] 1 QB 130	341
Allen v Whitehead [1930] 1 KB 211	411
Alphacell Ltd v Woodward [1972] 2 All ER 475	418
Ambe Chrispus Forfang v. The People (1975) BCA/1.c/75, unreported	266
Ambe Christopher v The People (1974) HCSW/3c/73, unreported	266
Anderson & Morris [1966] 2 QB 110	351
Anderson [1985] 2 All ER 961	383, 385
Anderton v Ryan [1985] AC 560	378
Anon (1634), Kel 53	328
Asylum Case (1950) ICJ 266	172
Attorney General's Reference No. 46 of 1997 [1998] 2 Cr App R (S) 338	483
Attorney General's Reference No. 7 of 1989 (Thornton) (1990) 12 Cr App R 1... ..	465
Attorney-General's Reference (No 1 of 1975) [1975] QB 773	338
Attorney-General's Reference (No 1 of 1992) [1993] 2 All ER 190	374
Attorney-General's Reference (No 3 of 1992) [1994] 2 All ER 121	364

B

B v DPP [2000] 1 All ER 833	419
B v DPP [2002] 2 AC 428	209, 210
Baker [1994] Crim LR 444	349

Baker v Levison [1950] 2 All ER 829	409
Bank of England v. Vagliano Brothers [1891] AC 107	90
Barcelona Traction Light & Power Company Ltd (Belgium/Spain), ICJ Rep. 1970, p.3	139
Barnard (1980) 70 Cr App R 28	382
Becerra & Cooper [1975] 62 Cr App R 212	349
Bedder v. DPP [1954] 2 All E.R. 801	316
Bennett v Richardson [1980] RTR 358	410
Betts and Ridley (1930) 22 Cr App Rep 148	340
Betty (1964) 48 Cr App R 6	352
Bivée Paul v. Ministère Public, Bulletin des Arrêts, CSCO, No. 18, 1968, p. 196	374
Blake [1997] 1 All ER 963	419
Bourne (1952) 36 Cr App R 125	328
Bourne [1938] 3 All E.R. 615	305
Bratty v. Attorney General for Northern Ireland [1964] L.L.R. 36	285
Broad [1997] Crim LR 666	385
Brown and others [1993] 2 All ER 75	5
Burgess [1991] 2 All ER 769	256

C

Cafferata v. Wilson [1936] 3 All ER 149	342
Caldwell [1981] 1 All E R 961	221
Calhaem [2008] EWCA Crim 1739	338
Callow v Tillstone [1900] 83 LT 411	413
Campbell & Bradley v. Ward (1955) N.Z.L.R. 471	372, 373
Campbell [1991] Crim LR 268	366
Canavan and Kidd [1998] 1 Cr App R (S) 243	482
Cape Bandy Syndicate v. Inland Revenue Commissioners [1921] 1 KB 64	100
Chandler v. DPP [1962] 3 All ER 142, HL	199
Chang Wing-Siu and Ors [1985] 1 AC 168	334
Chelmsford Crown Court, ex p. Birchall (1989) 11 Cr App R (S) 510	489
Cho Buweh & Anor v The People (1986) CASWP/54/85, unreported ...	476
Chrastny [1992] 1 All ER 189	390
Church [1965] 2 All E R 72	241
Clarke [1972] 1 All ER 219	259
Clarkson and Others [1971] 3 All E.R. 344	340
Clode v Barnes [1974] 1 All ER 1166	410

Cogan and Leak [1976] QB 217, [1975] 2 All ER 1059 CA	328
Comer v Bloomfield [1971] Crim LR 230	373
Comr of Police v. Henry Veenhuyzen (1970) WCCA/11.c/69, unreported	87
Coney and Others (1882) 8 QBD 534	340, 341
Cooke [1986] 2 All ER 985	381
Cooper v McKenna [1960] Qd. R. 406	285
Coppen v Moore (No 2) [1898] 2 QB 306	410
Crawford (1993) 14 Cr App Rep (S) 782	505
Crofter Hand-Woven Harris Tweed Co. Ltd. v. Veitch (1942) A.C. 435	381
Cundy v Le Coq (1884) 13 QBD 207	420
Cutting's Case (1887) U.S. For. Rel., p.75	134, 141

D

Dabbach Fouzi alias Mekoudé Marcus, Cameroon Tribute, 24 March 1984, p. 6	134
Davis (1881) 14 Cox CC 563	272
Day, Day and Roberts [2001] Crim LR 984	352
Democratic Republic of Congo v Belgium (2000) ICJ Reports 3.	148
Direct Supplies Co. Ltd. v Cameroon Bank Ltd (1971-1973) UYLR 41	88
Donovan [1934] 2 KB 498	5
DPP for Western Cape v Arnold Prins (A134/08) [2012] ZAWCHC 42	63, 64
DPP v Doot [1973] AC 807	387
DPP v Kent and Sussex Contractors Ltd (1944) KB 146	402
DPP v Nock [1978] AC 979	392
DPP v Smith (1961) A.C. 290	289
DPP v Stonehouse [1978] AC 55	360, 370
DPP v. Camplin [1978] 2 All E.R. 168	312
DPP v. Shannon [1974] 2 All E R 1009	355
DPP, ex parte Kebilene [1999] 4 All ER 801	418
Du Cros v. Lambourne [1907] 1 KB 40	340
Dudley and Stephens (1884) 14 QBD 273	302

E

Ededey v. State [1972] 1 All N.L.R. (Pt. 1) 15	288
Eichmann v. Attorney-General of Israel (1961) 36 ILR 5; on appeal	

(1962) 36 ILR 277	167
Eldredge v United States 62 F 2nd 449 (1932)	349
El-Hakkaoui [1975] 2 All ER146	152
Elias Wekuo v The People (1974) BCA/27c/74, unreported	475, 493
Emmanuel Ebot Tabe v The People (1968-1970) UYLR 121	466
English [1997] 4 All ER 545	334, 335
Etoh Rudolf Makumba (1978) Criminal Appeal No. CASP/11.c/78, unreported	179
Evans v. Cross (1938) 1 KB 694	91

F

Faulkner (1972) 56 Cr App R 594	483
FE Charman Ltd v Clow [1974] 3 All ER 371	410
Felstead v. R [1914] AC 534	269

G

G [2008] UKHL 37	418
Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong [1984] 2 All ER 503	417, 418, 419
Geddes [1996] Crim LR 894	371
Ghosh [1982] 2 All ER	381
Giannetto [1997] 1 Cr App R 1	329
Gibson & Anor [1990] 2 QB 619	381
Gibson and Gibson (1984) 80 Cr App Rep 24	342
Gibson and Sylverie [1991] 1 All ER 439	412
Gill [1963] 2 All E.R. 688	277
Gillick v West Norfolk and Wisbech AHA [1986] AC 112	338
Gilmour [2000] 2 Cr App R 407	352
Godwin Josiah v The State (1986) 1NWLR 125	434
Goodfellow v Johnson [1965] 1 All ER 941	410
Green v Burnett [1954] 3 All ER 273	410
Gregory Fru v The People (1973) CASP/4c/73, unreported	122, 493
Gullefer [1990] 3 All ER 882	365, 369
Gumbs (1926) 19 Cr App R 74	465

H

H L Bolton (Engineering) Co Ltd v P J Graham & Sons Ltd [1956] 3 All ER 624	402
Hallett Silbermann Ltd v Cheshire CC [1993] RTR 32	410

Harrison (1909) 2 Cr App R 94	465
Harrow LBC v Shah and Shah [1999] 3 All ER 302	413, 418
Haughton v Smith [1975] AC 476	377
Hibbert (1869) LR 1 CCR 184	415
Hill v. Baxter [1958] 1 Q.B. 277	284
Hodge v Higgins [1980] 2 Lloyd's Rep 589	417
Holmes v. DPP [1946] A.C. 588	318
Huggins (1730) 1 Barn KB 358	409
Hui Chi-Ming [1992] 1 AC 34	334
Hunt v. Maloney [1959] Qd. R. 164	281
Hyde, Sussex and Collins [1991] 1 QB 134	334

I

ICR Haulage Ltd [1944] KB 551	402
Ikram and Parveen [2008] 4 All ER 253	329
In Re Grand Jury Proceedings, Doe No. 770, 817 F.2d 1108 (1987)	152
In the Matter of Case Stated in Daniel Angoh v Ajong Deba & 2 Others	82
Inwood (1974) 60 Cr App R 70	438
Iromantu v. State [1964] 1 All N.L.R. 311	282

J

Jackson [1985] Crim LR 442	381, 386
John Henshall (Quarries) Ltd v Harvey [1965] 1 All ER 725	403
Jones [1990] 3 All ER 886	365, 369
Jones [2007] 3 WLR 907	374
Jones v. Brooks (1968) 52 Cr. App. R. 614	363
Joyce v. DPP (1946) AC 347	142
Julius Mua & Anor v The People (1974), BCA/7c/74, unreported	476

K

K [2001] 3 All ER 897	418
Kari Tizi Joel v The People (1982) BCA/18.c/82, unreported	292
Kay v. Butterworth (1945) 61 T.L.R. 452	284
Kenning & Other [2008] 3 WLR 1306	397
Kent [2004] 2 Cr App R (S) 367	483
Khan [1990] 2 All ER 783	374
King [2000] 1 Cr App R (s) 105	484

King v. Governor of Brixton Prison (1912) 3 KB 568	167
Kingston [1994] 3 All ER 353	270
Knüller (Publishing, Printing & Promotion) Ltd v DPP [1972] 2 All E. R. 898	359, 381
Kofi Mensah v. R (1952) 14 W.A.C.A. 174	308
Komaroni (1953) 103 L Jo 97	372
Kowbel v R (1954) 4 DLR 337	390
Kumar [2004] EWCA Crim 3207	419

L

Laila Jhina Mawji & Another v R [1957] 1 All ER 385	390
Lane and Lane (1986) 82 Cr App R 5	329
Larsonneur [1933] 24 Cr App R 74	414
Law Society United Service Bureau [1934] 1 KB 343	87
Le Brun [1991] 4 All E R 673	241
Lemon and Whitehouse & Gay News [1979] 1 All ER 898	412
Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705	403
Letelier v. Republic of Chile, 488 F. Supp. 665 (1980)	146
Lim Chin Aik v The Queen [1963] AC 160	419
Linnett v Metropolitan Police Comr [1947] 1 All ER 380	411
Longman and Cribben (1980) 72 Cr App Rep 121, CA	355
Lovesey and Peterson [1970] 1 QB 352	352
Lovick [1993] Crim LR 890	390
Lowe [1973] 1 All ER 805, CA	198
Luffman [2008] EWCA Crim 1739	337

M

M'Naghten's Case (1843) 8 ER 718	250
Magna Plant Ltd v Mitchell [1966] Crim LR 394	402
Marcelina N. Frederick v. The People (1968-1970) UYLR 96	321
Marchant and Muntz [2004] 1 WLR 442	338
Martin Ekeke Maewo v Vava Lunje (1971-1973) UYLR 18	81
Martin Ngafor v The People (1974) BCA/17c/74, unreported	475, 476, 493
Mayor & St. Mellons Rural District Council v. Newport Corporation [1952] AC 189	87
Mbega Ondoia Martin (1984), unreported, Cameroon Tribune 14 June 1984, p.6	475

Michael (1840) 9 C & P 356	328
Mickleborough v BRS Contracts Ltd [1977] RTR 389	410
Mitchell & King [1999] Crim LR 496	348
Moll v. Inland Revenue Commissioners [1955] TL 38	100
Moore v I Bresler Ltd [1944] 2 All ER 515	402
Moussel Bros v. London & North Western Railway Co Ltd [1917] 2 KB 836	410
Muhammad [2002] EWCA Crim 1856	418
Muir v. Keay (1975) LR 10 QB 594	91
Mulcahy v. R (1868) L.R. 3 H.L. 306	386
Mvogo Eloundou Sebastien (1984), Cameroon Tribune 14 June 1984, p.6	475

N

Nash [1999] Crim LR 308	371
National Coal Board v Gamble [1959] 1 QB 11	342
National Coalition for Gay & Lesbian Equality & Anor v Minister of Justice & Ors 1998 (2) SACR 556 (CC)	7
Newell (1980) 71 Cr App Rep 331, CA	323
Ngoro Severin-Marcel (1983), unreported, Cameroon Tribune, 31 March 1983, p. 6	475
Ngum Njah (1981), Cameroon Tribune 12 August 1981	475
Nicholas v State (1987) 68 Wis 416, 32 NW 543	494
Nji Christopher v The People (1984) CASWP/24/84, unreported	493, 494
Nomad v. Bornu N.A. (1954) 21 N.L.R. 31	317

O

O'Flaherty & Others [2004] 2 Cr. App. R. 20	348
Onkoué Moise v. Ministère Public, Arrêt No. 50, 26 Nov. 1968, CSCO, unreported	374
Onslow v Inland Revenue Commissioners (1890) 25 QBD 465	88
Oscar Ituka v The People (1968-1970) UYLR 7	125

P

Parpalakis and Oharcopos, Cameroon Tribune, 8 April 1983, p. 6	134
Perman [1996] 1 Cr App R 24.	334
Pharmaceutical Society of Great Britain v Storkwain Ltd [1986] 2 All ER 635	413, 418

Philips (1987) 86 Cr App R 18	389
Pinochet Case (No.3) [1999] 2 WLR 825.....	144
Prince (1875) LR 2 CCR 154	415
Prosecutor v Blaskic (1997) ICTY, IT-95-14-AR108bis at para 38.....	147
Prosecutor v Charles Taylor, Decision on Immunity from Jurisdiction, SCSL-03-01-1 (May 31, 2004) at para 52.....	148
Prosecutor v Duska Tadic (1999), Appeal Judgment, IT-94-1-A (15 July 1999)	332
Prosecutor v Mitar Vasiljevic (2002), Trial Judgment, IT-98-32-T (29 November 2002) at para 67	332

Q

Quality Dairies (York) Ltd v Pedley [1952] 1 All ER 380	410
---	-----

R

R v Adekanmi (1944) 17 N.L.R. 99	318
R v Adelodun [1959] W.N.L.R. 114	313
R v Akpakpan (1956) 1 F.S.C. 1	317
R v Alice Eriyamremu [1959] W.R.N.L.R. 270	255
R v Anderson (1868) 1 Cox's Criminal Cases 198.	
R v Andrews [1987] AC 251	485
R v Bainbridge [1959] 3 All E.R.	200
R v Ballysingh 37 Cr. App. R. 28	107
R v Bassey [1963] All N.L.R. 280	317
R v Bedingfield (1879) 14 Cox CC 341	485
R v Bliss (1837) 7 A & E 500	485
R v Bow Street Magistrate & Ors ex. P. Pinochet Ugarte (No. 3) [1999] 3 All ER 97, HL.	148
R v Boyle [1954] 2 All ER 72	494
R v Bullock [1955] 1 All E.R. 15	339
R v Button [1900] 2 QB 597	373
R v Carnall (1995) Crim LR 944	485
R v Chandler [1973] 1 KB 125	494
R v Charlson [1955] 1 All E.R. 859	284
R v Chiswibo (1961) (2) S.A. 714	241
R v Churchill [1967] 2 AC 224	388
R v Clarke [1972] 1 All E.R. 219	284

R v Cornwall (1830) 2 Stra 881	494
R v Cox (1992), 12 Butterworth Medico-Legal Reports, 18 September 1992	199
R v Dawson [1960] 1 All E.R. 558	391
R v Dhlamini 1955 (1) SA 120 (T)	257
R v Duffy [1949] 1 All E.R. 932.	316, 319
R v Duffy [1966] 1All E.R. 62	291
R v Eagleton (1855) Dears 515	368, 373
R v Ebi (1936) 3 W.A.C.A 36	298
R v Eseno (1960) 5 F.S.C. 50	318
R v Gore (1611) 77 ER 853; 9 Co. Rep. 81.	194
R v Governor of Brixton Prison, ex p Soblen [1963] 2 QB 243	171
R v Green (1955) 15 W.A.C.A. 73	315
R v Hare [1934] 1 KB 354	87
R v Hlatwayo and Another 1933 TPD 441	363
R v Igiri (1948) 12 W.A.C.A. 377	318
R v Igwe (1938) 4 W.A.C.A. 117	296
R v James Adekanmi, 1944, XVII N.L.R. 99	319
R v Kemp [1957] 1 Q.B. 399	252, 253, 284
R v Knock (1877) 14 Cox. 1	291
R v Kupferberg (1918) 13 Cr App Rep 166	345
R v Lavallee (1988), 65 C.R. (3d) 387	298
R v Linnecker [1904-7] All ER Rep 797; [1906] 2 KB 99	373
R v Manning (1849) 2 C & K 904.	390
R v Martyr [1962] Qd. R. 398	280
R v Miller [1983] 1 All ER 978, HL	230
R v Mohan [1976] QB 1; [1975] 2 All ER 193	362
R v Nekuda [(1989) 39 A Crim R 5 (NSW CA)	134
R v Nlhovo (1921) AD 485	369
R v Nye and Loan (1977) 66 Cr App R 252	485
R v Pembliton [1874-80] All E.R. 1163	196
R v Price (1884) 12 QBD 247	61
R v Quick & Paddison [1973] 3 W.L.R. 26	284
R v Ring (1892) 8 T.L.R. 326	376
R v Robinson [1915] 2 KB 342	365, 372, 373
R v Saunders & Archer (1573) 2 Plowden 473; (1575) 75 ER 706	195, 339, 340
R v Sharpe (1903) TS 868	369
R v Sheppard (1981) AC 394	198
R v Swindall and Osborne (1846) 2 Carr & Kir 230	331

R v Taylor (1875) 2 C.C.R 147	339
R v Thomas, East P.C. 934	112
R v Tralka [1965] Qd. R. 225	280
R v Walker [1962] Crim LR 458	387
R v White [1910] 2 K.B. 124	373, 376, 377
R v Whynot (1983), 9 C.C.C. (3d) 449	298
R v Yuthiwattana (1985) 80 Cr. App. R. 55	231
Rabey v R (1977) 37 CCC (2nd) 461	255
Rafferty [2007] EWCA Crim 1846	334
Rahman & Others [2009] 1 AC 129.	335
Rampton (1664) Kel. 41	208, 209
Ratten v R [1972] AC 378	485
Re Athlumney (1898) 2 QB 547.....	120
Re F [1990] 2 AC 1 (sub nom F. v. West Berkshire HA [1989] 2 All E.R. 545, HL)	304
Re Lockwood (1958) Ch. 231	89
Redhead Freight Ltd v Shulman [1989] RTR 1	403
Reed [1982] Crim LR 819	386
Regina v Bow Street Magistrate, ex. P. Pinochet Ugarte (No. 3) [2000] 1 AC 147..	145
Reid (1975) 62 Cr App R 109	352
Reniger v Fogossa (1552) 1 Plowden 1	302
Republic of the Philippines v Marcos (No. 1), 806 F.2d 344 (1986).....	152
Republic v Harmer [1964] L.L.R. 36	284
Robert Millar (Contractors) Ltd [1971] 1 All ER 577	401
Rocha et al v US, 288 F.2d 545 (1961).....	142
Rook [1993] 2 All ER 955	349
Rubie v Faulkner [1940] 1 KB 571	342

S

S v M 2004 (1) SACR 228 (O)	7
S.S. Lotus Case (France v. Turkey) [(1927) PCIJ, ser. A, No. 10	135, 139, 141
Saik [2007] 1 AC 18	381
Sakwe Isaac v The People (1984), CASP/19c/84, unreported	476
Salabiaku v France (1988) 13 EHRR 379	418
Salomon v Salomon & Co Ltd [1897] AC 22	400
Scott (1979) 68 Cr App R 164	388
Scott v MPC [1975] AC 818	381
Senior [1889] 1 QB 283	198

Sharp [1987] 3 All E.R. 103, CA	278
Shaw v DPP [1961] 2 All E. R. 446, HL	359
Shaw v DPP [1962] AC 220	61, 381
Shepherd [1987] Crim LR 686, CA	279
Sheppard [1980] 3 All ER 899	181
Sherras v De Rutzen [1895] 1 QB 918	418, 420
Shivpuri[1987] AC 1	377, 378
Siracusa (1989) 90 Cr App R 330	381, 382
Smith (1900) 17 SCR 561	290
Somchai Liangsiriprasert [1991] AC 225	384
Southwark London Borough Council v. William (1971) 2 All E.R. 175 ...	301
Speck [1977] 2 All ER 859	229
Stapleton v. R [1952] 86 C.L.R. 358	263
State v. Agbo (1973) 3 E.C.S.L.R. 4	291
State v. Appoh [1970] 2 All N.L.R. 218	281
State v. Nwaoga (1970-1971) 1 E.C.S.L.R. 17 (HC); [1972] 1 All N.L.R. (Pt. 1) 149 (SC)	287
State v. Ufomba (1972) E.C.S.L.R. 755	318
Stephens (1866) LR 1QB 702	409
Stewart and Schofield [1995] 3 All ER 159	352
Strowger v. John [1974] Crim LR 123	413
Stunt v. Bolton [1972] R.T.R. 435	231
Sullivan [1983] 2 All ER 673	253
Sweet v Parsley [1969] 1 All ER 347	415, 418

T

T [1990] Crim LR 256	255
Taylor [2002] Crim LR 205	382
Tempest (1859) Dalloz I. 88	137
Teper v R [1952] AC 480	485
Tesco Supermarkets Ltd v Nattrass [1971] 2 All ER 127	402, 403
Thabo Meli & Others v. R [1954] 1 All E R 373	239, 241
The People v Achendong Abraham (1987) HCF/41c/87, unreported	209
The People v Agbormbi Angelina (1987) HCM/18c/87, unreported	377
The People v Akoffei Joseph (1975) Charge No. HCSW/25c/75, unreported	313
The People v Ama Chukwu (1975) Charge No. HCSW/7c/75, unreported	314
The People v Anyuchili Tandafor (1971-1973) UYLR 136	80, 463

The People v Asonganyi (1973), Bamenda Court of Appeal, unreported	121
The People v Bikelle Alexander & Anor (1983) HCB/29c./83, unreported	382
The People v Bobotie Mbiaye (1973) HC/43c/73, unreported	493
The People v Charles Kebbi (1983) Cameroon Outlook, 29 April 1983, p. 12	466
The People v Christopher Foncham (1973) HCSW/52c/73, unreported	476
The People v Christopher Fru (1973) HCSW/54c/1973, unreported	475
The People v Cletus Che (1976) HCSW/51c/76, unreported	309
The People v David Efukani (1973) HCSW/3c/73, unreported	309
The People v Diabe Moses & Ikome M. Obadiah (1985) High Court, unreported	476
The People v Elias Ngini (1975) Suit No. HCSW/17c/75, unreported	314
The People v Emmanuel E. Besong (1973) HCSW/21c/73, unreported...	476
The People v Evaristus Ndong (1971-73) UYLR 145	209
The People v Fon Fonwale Dominic (1987) HCF/26c/87, unreported	209
The People v Francis Nsaiben (1972), Bamenda Court of Appeal, unreported	121
The People v Godguide Nganyu & Anor (1984) HCN/18/84, unreported	328, 495
The People v James Okonkwo & Anor (1973) BM/181/73, unreported	309
The People v Kum Ngah Denis & Another (1983) HCB/3c/83, unreported	391
The People v Longpa Dieudonné (1978), BCA/2c/78, unreported	87
The People v Mandoline Mathias (1984) HCK/77c/84, unreported	476
The People v Mathias Ncho (1973) HCSW/37c/73, unreported	493
The People v Mugri Ephraim (1982) BM/198c/82, unreported	417
The People v Nanji Jacob & 2 Ors (1984) HCK/10c/84, unreported	333
The People v Nchindia Isaac (2005) 2 CCLR 1-125 Part 11, p.81	179
The People v Ngoungoun (1984) HCB/42c/84, unreported	493
The People v Ngu Barnabas (1987) (No case number), unreported	314
The People v Okeke Okafor John (1968) WCLR 60	89
The People v Peter Nche (1973) BAHc/37c/73, unreported	494
The People v Sammy Banji & 2 Others (1983) HCB/29c/83,	

unreported	391
The People v Samuel Bissong (1973) Charge No. HCSW/3c/73, unreported	276
The People v Suffer Franc & 15 Others (1975), Appeal No, BCA /19c/75, unreported	392
The People v Sylvester Ngeh & 2 Others (1978), Appeal No. BCA/9c/78, unreported	392
The People v Tankendem André (1982) Charge No. MuM/194c/82, unreported	417
The People v Tashong Moses (1984) Suit No. HCB/18/84, unreported	495
The People v Wehbeni Aloysius (1984) HCB/4c/84, unreported	476, 494
The People v William Nkemasong & Boniface Nkemasong (1971-1973) UYLR 157	154
The People v Yombo David (1982) Cameroon Tribune, 6 October 1982, p. 4	476
The Schooner Exchange v. McFaddon (1812) 7 Cranch 116	151
Thomas Mosenja v The People (No. 2) (1971) UYLR 32	382
Thompson (1965) Cr App R 1	383
Thompson v Trevanion (1693) Skin. 402	485
Thuku (alias Nyaga) v. Republic [1965] E.A. 496	315
Timbu Kolian v. The Queen (1968) 42 A.L.J.R. 295	280
Tobi v Nicholas (1988) 86 Cr App R 323	485
Toothill [1998] Crim LR 876	372
Tosti & White [1997] Crim LR 746	371
Treacy v. DPP [1971] 1 All ER 110	152
Tree [2008] EWCA Crim 261	381
Tuck v. Robson [1970] 1 All E R 1171	342
Tumenta Teboh v The People (1974) Appeal No. BCA/16.c/73, unreported	179
Tyrrell [1894] 1 QB 710	389
Tzu-Tsai Cheng v. Governor of Pentonville Prison [1973] AC 931.....	168

U

US v. Noriega, 746 F. Supp. 1506 (1990)	151
US v. Rodriguez, 182 F. Supp. 479 (1960)	142
US v. Yunis (No. 2) 681 F Supp 896 (1988)	141
Usumanu v. The People (1968) W.C.L.R. 17)	318, 321

V

Vane v Yiannopoulos [1964] 3 All ER 820	411
---	-----

W

Waddington v. Miah (1974) 1 WLR 683	121
Walker (1962) Crim L R 458	382
Warner v. Metropolitan Police Commissioner [1969] 2 AC 256	399
Webster [2006] EWCA Crim 415	343
Whitefield (1984) 79 Cr App R 36	348
Whybrow (1951) 35 Cr App R 141	362
Widdowson (1986) 82 Cr App R 314	370
Wilcox v. Jeffery [1951] 1 All E.R. 46	340
Wildenhus' case (1887), 120 US 1	137
Wilson [1997] 3 WLR 125	5
Windle (1952) 2 All ER 1	263
Winter v. Hinckley and District Co-operative Society Ltd [1959] 1 All ER 403	410
Winzar v Chief Constable of Kent (1983), The Times, 28th March 1983	414
Woodrow (1846) 15 M & W 404	412, 413
Worthy v Gordon Plant (Services) Ltd [1985] CLY 624	403

Y

Yip Chiu-Cheung [1994] 2 All ER 924	199, 385
Youden and Others [1950] 1 KB 544	343

Table of Instruments

African Charter on Human and Peoples' Rights 1981 (1986)	63, 171
American Convention on Human Rights 1969	62
Basic Principles for the Treatment of Prisoners 1990	428
Body of Principles for the Protection of All Persons under any	
Form of Detention or Imprisonment 1988	428
Charter of the United Nations	76, 149, 150
Code de Procédure Pénale Camerounaise, 2005, Part XI, ss.635-675	166, 167
Convention on Laundering, Search, Seizure and Confiscation of	
the Proceeds from Crime 1990	74
Convention on the High Seas 1958	135
Convention on the Law of the Sea 1982	137
Convention on the Prevention and Punishment of Crimes against	
Internationally Protected Persons including Diplomatic Agents 1973	74
Convention on the Prevention and Punishment of the	
Crime of Genocide 1948	74
Convention on the Territorial Sea 1958	137
Criminal Law Act 1977 (English)	392
Criminal Procedure Ordinance, Cap 49 of the 1958 Laws	45, 48, 106-112
European Convention on Extradition 1957	166
European Convention for the Protection of Human Rights 1950	68
European Convention on Laundering, Search, Seizure and	
Confiscation of the Proceeds of Crime 1990	454
Food and Drugs Act 1955 (English)	420
Francophone African States Extradition Treaty (General Convention	
on Cooperation in Matters Relating to Justice) 1961	166
General Convention on Privileges and Immunities (Africa) 1965	150
General Convention on the Privileges and Immunities	
(United Nations) 1946	150
Geneva Red Cross Conventions of 1949 and its 1977	
Additional Protocols	74
Hague Convention for the Suppression of Unlawful Seizure	
of Aircraft 1970	74, 138
International Convention against the Taking of Hostages 1979	74
International Convention on the Suppression and Punishment	
of the Crime of Apartheid 1973	74
International Covenant on Civil and Political Rights 1966	62, 68, 119

Interpretation Act 1889 (English)	86
Interpretation Ordinance, Cap 89 of 1958 Laws	86
Magistrates' Court (Southern Cameroons) Law 1955	436
Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971	74, 138
Ordinance No. 72-16 of 28 September 1972	121, 123, 492
Penal Code (Cameroon)	passim
Rome Statute of the International Criminal Court 1998 (2002)	74, 145, 454
Sexual Offences Amendment Act 2007 (South Africa)	63, 64
Single Convention on Narcotic Drugs 1961	74
Southern Cameroons High Court Law 1955	46, 436, 450
Standard Minimum Rules for the Treatment of Prisoners 1955	428
Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963	74, 136, 137
Trade Description Act 1968 (English)	420
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988	74
United Nations Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment 1984	74
United Nations Declaration on the Basic Principles of Justice for Victims and Abuse of Power 1985	434
United Nations Convention against Corruption 2003	454
United Nations Convention against Transnational Organised Crime 2000	159, 454
United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990	428
Universal Declaration of Human Rights 1948	62, 119
Vienna Convention on Consular Relations 1963	149
Vienna Convention on Diplomatic Relations 1961	148, 149

Preface

This book is about the general principles governing criminal liability and punishment/sentencing. Its scope is wider than what is usually covered in a traditional text on the general part of the criminal law. The book begins with an introductory part that explores the historical development of the criminal law generally. Next, the book deals with the following core subjects: application of the criminal law, criminal responsibility, participation in crime, and criminal disposal. Major themes such as criminal culpability, defences of general application, and sentencing are explored at some length. Throughout the text, questions of theory are contextually brought into the discussion.

Local cases and published academic writing on the general part of the criminal law are extremely limited, far fewer than on specific offences. Judges in this country tend to decide cases on the basis of bare facts and the evidence adduced. They shy away from discussing the principles of law involved, less still expatiating on them. I have faced this deficit by researching into and drawing from appropriate foreign case-law and academic writing. Many provisions of the Penal Code in this area have been borrowed from or been inspired by English criminal law. I have therefore drawn substantially from relevant English criminal law cases to illustrate and clarify the meaning and scope of some of the Code provisions. These cases expatiate on and expound the cryptic provisions of that document on topics such as the mental and physical elements in crime, attempt, accident, insanity, conspiracy and so on. However, the foreign cases serve not as binding authority but as illustration of some of the Code provisions. They are strictly only of persuasive authority, although in some instances the persuasive effect of some could be greater than is normal for a foreign case.

The jurisprudence and scholarship appropriately woven into the discussion give depth and perspective to the analysis of the various topics covered. The book thus provides a broader and deeper perspective on the general part of the criminal law. This wide approach is justified by the fact that this publication, the first on the subject in this country, is a foundational text requiring content breadth and depth.

The scope of this text is accordingly not confined to the general principles governing criminal liability but extends to principles of punishment/sentencing. There is good reason for this wide scope. Criminal law provides the vehicle for punishing the offender. Although sentencing is often studied as a discipline in its own right or separately in the context of

criminal procedure, there is in fact a nexus between the general principles of criminal law and the subject of punishment/sentencing. Firstly, the principle of legality refers not only to crime but also to punishment. Secondly, the interdisciplinary nature of the study of criminal law, punishment, and criminal procedure requires that the inter-connected topics of criminal responsibility and punishment/sentencing be treated together, at least in their essential elements. These fields in fact form Book I of the Penal Code, the basis of this textbook. Book I, a piece of legislation heavily influenced by English and French law and in force since 1966, is entitled 'Criminal Law'. It covers the following three broad areas: (i) application of criminal law – application in time and space, foreign criminal law and judgments; (ii) punishment and prevention – penalties and preventive measures, concurrent and consecutive sentences, suspension and remission of sentence, expungement of conviction; and (iii) criminal responsibility – responsibility and irresponsibility, diminished responsibility, aggravation of responsibility, mitigation and selection of sentence, attempt and conspiracy, participation. In many jurisdictions, these matters are often the subjects of separate treatment.

A commentator is therefore apt to take issue with the inclusion of punishment/sentencing in a criminal code, arguing that it appropriately appertains to the discipline of criminal procedure. But the legislative document in question is not denoted a 'criminal code' but a 'penal code'. This is a clear indication that the document is also concerned with the subject of punishment/sentencing. There is, in fact, a closer relationship between the substantive criminal law and punishment/sentencing than is usually conceded by academic writing on criminal law. Sentencing is in fact the bottom line of the criminal process. Its purposes and guidelines rationalise the grading of criminal offences, enabling the judge to impose a sentence that is presumptively merited. It is at the stage of sentencing that society, through the mouth of its appointed judges, gives its final and formal response to criminal conduct. That response is the infliction of appropriate punishment which, in terms of the principle of legality, must itself be specified beforehand.

This book, the fruit of years of extensive research, is pedagogically designed to facilitate understanding of the general part of the criminal law. As in his other works, the author's approach in this text is highly accessible. This additionally makes the book very suited as a core text for law students, members of the judiciary, practising lawyers, law teachers and law enforcement officers. They will undoubtedly welcome the publication of this long-overdue premier, comprehensive, and invaluable volume in this country.

Professor Carlson Anyangwe PhD, LLM (London), PGDCL (Strasbourg),
LLB, BA-Law (Yaoundé)

Rector,
Butterworth Campus,
Private Bag X3138, Butterworth 4960
Walter Sisulu University
Eastern Cape
Republic of South Africa

East London & Pretoria, July 2015

The works of legal historians and criminologists inform us that the criminal law is the product of many forces and has a long history¹. Since crime is a social phenomenon and creation², the range of crimes and the processes for dealing with violators of the criminal law are not the same in all societies. Societies throughout the ages have had rules that govern the behaviour of their members. These rules or social norms state expectations about what will be considered appropriate behaviour for particular people in specific situations. They reflect people's values, those things that they consider worthy, desirable, or proper. The violation of social norms constitutes deviance, which may be approved, as with heroism or patriotism; or disapproved, as with cowardice or betrayal. It is thus possible to deviate by 'over-conforming' to a norm or by 'under-conforming' to it. Deviance in a disapproved direction is often met with a sanction. The purpose of imposing sanction is to punish past non-conformity to the social norm and to ensure future conformity to it.

Some of society's social norms become legal norms. Through the political and judicial process, laws are passed and interpreted. In this way, informal social norms sometimes become formal legal norms. Criminalisation of certain types of conduct is a means of social control over the behaviour of society's members. It prohibits behaviour for particular individuals in specific situations.

Criminology identifies at least three social sources of the criminal law. Firstly, some acts are made criminal on the grounds that they are morally objectionable; they evoke moral indignation or a sense of outrage. Secondly, the criminalisation of some acts represents social consensus on the desirability and necessity for punishing them. Here, the law reflects the shared values and norms of the whole society rather than the norms and values of particular social groups. Thirdly, the criminalisation of certain other acts reflects the distribution of political power and economic resources in society. Those with power and resources in a given society determine which types of behaviour will be defined as crimes. Thus, for example, the criminal law in a capitalist

¹ See, for example, Stephen Sir JF, *A History of the Criminal Law of England*, 3 volumes, 1883; Wooton B., *Crime and the Criminal Law*, Sweet & Maxwell, London, 1981; Barnes HE, *The Story of Punishment: A Record of Man's Inhumanity to Man*, Montclair, New Jersey, 1972.

² Conklin JE, *Criminology*, Macmillan, New York, 1981, p. 5.

state is said to reflect the will of the economic elite and behaviour that threatens the interests of members of that elite is sanctioned.

“The criminalization of behaviour is usually political in nature, with the criminal law benefiting one group. The conflict perspective on the criminal law suggests that the nature of the criminal law is closely intertwined with the distribution of political power and economic resources in a society. Conflict theorists argue that only certain types of behaviour are legally defined as crimes, and that those with power and resources in a given society determine which types of behaviour will be defined as crimes and which types will not be defined as crimes. The criminal law in a capitalist nation reflects the will of the economic elite; behaviour that threatens the interests of that elite will be harshly sanctioned. The conflict perspective claims that the criminal justice system in such a society will be biased against those who are disadvantaged by social class or minority-group status. The claim is made that lower-class people are more apt than middle-class people to be watched by the police, to be arrested in suspicious situations, to be held in jail rather than released on bail, to be tried in court, to be found guilty, and to receive harsh sentences for their crimes.”³

Generally, therefore, the criminal law is greatly influenced by a variety of interest groups, the bases of some of which are moral and others economic and political.

Section 1. The concepts of ‘crime’, ‘offence’, ‘criminal law’, and ‘penal law’

In legal discourse it is important to have reasonably precise meaning of the relevant terms. Terminological clarity is necessary not only out of a desire for logical symmetry. It is also necessary for the purpose of ensuring that the relevant terms are useful and subservient to policy.

§1. ‘Crime’ and ‘offence’

The word ‘crime’ is commonly used but it defies a precise legal meaning because of the difficulty of finding a satisfactory way of legally defining it in a way that has general application. A definition is not the same thing as a description. A proper definition of ‘crime’, like any other term, ought

³ Idem, pp. 6-7.

therefore to be precise and unambiguous. It ought to be capable of enabling one to say whether any given prohibited conduct is a crime or not a crime. But such a conclusive definition is not easy to formulate. A prohibited conduct or a wrong may be a crime or a tort or both. A law may criminalise or de-criminalise a particular act and yet only the act's legal characterisation and not its nature would thereby have changed. For example, conduct such as suicide, homosexuality, prostitution, and adultery were, in many jurisdictions, at first criminalised then later de-criminalised. De-criminalisation attests to the fact that society's view of the conduct in question, especially moral behaviour, changes over a period of time.

Society's morals and values have an effect on the law. Therefore what is criminal may vary over time and from one country to another. For example, many jurisdictions criminalise conduct now denoted as 'victimless crimes' such as gambling, adult prostitution, homosexuality even in private and even between consenting adults, public drunkenness and so on. On the other hand, the universal condemnation and criminalisation of homosexuality has receded in the face of a shrinking moral sphere and of increased advocacy of 'gay rights' based on human rights. In some countries homosexuality is now tolerated or legalised. Consensual adult assault of a certain degree for sexual gratification, as practised by sado-masochists, is tolerated in some societies.⁴ Consent may be a valid defence to tattooing and other forms of branding or aesthetic markings on humans. In the English case of *Wilson*⁵ the defendant, Wilson, branded his initials, 'A' and 'W', onto his wife's buttocks using a heated butter knife. She regarded the branding as "a desirable personal adornment", and had apparently originally requested that the branding be on her breasts. It was Wilson who persuaded her to have the branding on her buttocks instead. The matter only came to light when the burns became infected and she sought medical treatment from her doctor who reported the

⁴ For a discussion of sado-masochism from a medical and legal aspect of the problem, see Leigh LH, 'Sado-masochism, Consent, and the Reform of the Criminal Law,' *The Modern Law Review*, vol. 39, 1976, p. 13. In the English case of *Donovan* [1934] 2 KB 498 a person of that name, for his own sexual pleasure, beat a 17-year-old prostitute on the buttocks with a cane in circumstances of indecency. A doctor examined her two days later and concluded that she had had a 'fairly severe beating'. Donovan's convictions for common and indecent assault were quashed, apparently because of the judge's misdirection to the jury. However, in *Brown and others* [1993] 2 All ER 75 it was held that the consent of the injured party could not be a defence to a charge of assault causing actual bodily harm. Lord Templeman said: "The question whether the defence of consent should be extended to the consequences of sado-masochistic encounters can only be decided by consideration of policy and public interest ... Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised."

⁵ [1997] 3 WLR 125.

incident to the police. Wilson was convicted of assault occasioning actual bodily harm, and appealed. The Court of Appeal allowed the appeal.

With changing times, society's view of some behaviour can change. Abortion, for example, has been legalised in some countries, even though some people still believe it is morally wrong. Similarly, a limited form of euthanasia (so-called 'mercy killing' or 'assisted suicide') has been accepted as legal in a number of countries, again even though many people believe that this is immoral, as it denies the sanctity of human life. In *Airedale National Health Service Trust v Bland*⁶ it was ruled that medical staff could withdraw life support systems from a patient, who could breathe unaided but was in a persistent vegetative state. Medical staff could thus withdraw the feeding tubes of the patient, despite the fact that this would inevitably cause him to die.

Some authors define 'crime' in terms of the nature of the proceedings which may follow from its commission. For them, a crime or an offence is a legal wrong that can be followed by criminal proceedings which may result in punishment⁷. Other authors define 'crime' in terms of the sanction that follows its commission. A crime, they assert, is a wrong whose sanction is punitive and is in no way remissible by any private person, but is remissible by the state alone, if remissible at all.⁸ Yet another definition is that a crime is an act committed or omitted in violation of a law forbidding or commanding it and which is sanctioned by punishment. Burchell, for example, defines a crime as "any conduct that is defined by the law to be a crime, and for which punishment is prescribed."⁹

Card offers the following somewhat involved definition.

"A crime or offence is an illegal act, omission or event, whether or not it is also a tort, a breach of contract or a breach of trust, the principal consequence of which is that the offender, if he is detected and it is decided to prosecute, is prosecuted by or in the name of the State, and if he is found guilty is liable to be punished whether or not he is also ordered to compensate his victim."¹⁰

For Glanville Williams, however, a crime is simply

⁶ [1993] 1 All ER 821.

⁷ Williams G, *Textbook of Criminal Law*, Stevens & Sons, London, 1978, p. 13.

⁸ Turner JWC, *Kenny's Outline of Criminal Law*, 19th ed., Cambridge University Press, 1966.

⁹ Burchell JM, *Principles of Criminal Law*, Lansdowne, Juta, 2005, p. 58.

¹⁰ Card R, *Criminal Law*, Butterworths, London, 1995, p. 1.

“an act that is condemned sufficiently strongly to have induced the authorities ... to declare it to be punishable before ... the courts.”¹¹

Hart’s remarkable sophistry-inherent view is that a crime is

“not simply anything which a legislator chooses to call crime. It is not simply anti-social conduct which public officers are given the responsibility to suppress. It is not simply any conduct to which a legislator chooses to attach a criminal penalty. It is conduct which is duly shown to have taken place which incurs a solemn and formal pronouncement of moral condemnation of society.”¹²

From the point of view of the Penal Code of this country, however, ‘crime’ may be defined functionally as any act or omission which is stated by law to constitute an offence and in respect of which the law has clearly provided an applicable penalty or measure. A crime is thus any behaviour that violates the criminal law and is subject to legally defined punishment by the state.

Although it is difficult to give a ‘perfect’ definition of what a crime or offence is, nevertheless, it is possible to point to certain characteristics generally common to all crimes. In the first place, a crime is a public wrong. It has a particularly harmful effect on society. It is conduct that does more harm than just interfere with merely private rights. Secondly, a crime may also be a moral wrong. In the South African case of *S v M*¹³, the accused was charged with bestiality. He challenged the constitutionality of this crime. He argued that criminalising bestiality infringed his right to freedom and security of the person and the right to privacy. He further argued that it also infringed his right not to be discriminated against unfairly on the basis of his sexual orientation. The court rejected this argument. It held that certain prohibitions were reasonable and justified. It quoted with approval the following passage from Constitutional Court decision in *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others*¹⁴ :

“There are undoubtedly some acts which are so repugnant to and in conflict with human dignity as to amount to perversion of the natural order. ...Bestiality seems to me to be an obvious example of an

¹¹ Williams G, *Textbook*, p. 29.

¹² Hart HM, ‘The Aims of the Criminal Law,’ 23 *Law and Contemporary Problems* (1958), p. 405.

¹³ 2004 (1) SACR 228 (O).

¹⁴ 1998 (2) SACR 556 (CC).

independent unnatural offence which justifies this categorisation ... It seems to me that the State has (or can justify the existence of) a responsibility of its citizens to prevent any individual or group from descending to the level of the beast (literally or figuratively). Unrestrained licence has always been the mark of a society in decay.”

The statement that a crime may also be a moral wrong is not invalidated by the fact that many acts are now prohibited on grounds of the protection of basic human rights, of public policy or of social expediency¹⁵ rather than on their immoral nature, and that certain acts which are regarded as immoral¹⁶ may in fact not be crimes at all.

Being a public wrong, a crime affects in some ways the social order and is thus both a human and a social reality. Crime is therefore of academic interest. It is of interest not only to the lawyer. It is of interest also to the physician, the psychiatrist, the psychologist and the sociologist. It is a distinct and complex phenomenon that pits the offender against society and triggers societal reaction against him.

The terms ‘crime’ and ‘offences’ tend to be used interchangeably, for since crimes are offences against the law, all crimes are offences. In a narrow sense, however, the word ‘crime’ refers to those offences of a serious kind against the law such as treason, homicide, bodily harm, theft, burglary; while ‘offence’ is commonly applied to less serious offences such as traffic offences, licensing offences. In reality, there is no technical difference between a ‘crime’ and an ‘offence’.

There are four different possible ways in which offences may be classified: by the mode of commission¹⁷; by the requisite mental element for crime¹⁸; by the objective gravity of the offence¹⁹; and, by the very nature of the offence²⁰.

¹⁵ Examples of such prohibited acts are regulatory offences and ‘victimless’ crimes such as prostitution, consensual homosexuality, public drunkenness, and gambling.

¹⁶ Conduct regarded by many as immoral include adultery, homosexuality, heresy, blasphemy, incest and prostitution.

¹⁷ A classification based on the mode of commission of each offence results in a distinction between crimes of commission and crimes of omission, on the one hand, and between result-crimes and conduct-crimes, on the other hand.

¹⁸ A classification of offences based on the requisite mental element for the commission of each offence yields a distinction between intentional and non-intentional crimes, crimes requiring a mental element and crimes in which the mental element is not required (strict liability offences).

¹⁹ The distinction between felonies, misdemeanours and simple offences is based on the presumed objective gravity of each offence as determined by the penalty prescribed by law for each offence.

The Penal Code adopts the traditional method of classification based on the presumed objective gravity of each offence. That classification results in the classic threefold distinction between felonies, misdemeanours, and simple offences. From the point of view both of procedure and punishment simple offences are the least serious of the three categories of offences, misdemeanours are more serious offences, and felonies are the most serious offences.

§2. ‘Criminal law’ and ‘penal law’

The criminal law is that branch of the law which spells out the reaction of the state to crime and the criminal. It is thus concerned primarily with defining conduct that is criminal and the penalty attaching to each. It is administered by criminal courts following criminal procedure. Its main purposes are to protect the individual and his property from harm, to preserve order in society, and to punish those who have broken the law and so deserve punishment. Its other aims include educating people about appropriate conduct and behaviour, and, to some extent, enforcing society’s morals and values. Its object is to secure compliance with rules of behaviour, primarily through the threat of punishment if they are broken. It is further concerned with the question whether offenders are to be punished for the purpose of deterrence or compulsorily treated for purposes such as re-education, re-socialisation, and rehabilitation.

The criminal law calls attention to the enduring character of core societal values such as truth, loyalty, decency, liberty, sanctity of human life, integrity of the human body, and the right to property. It also relays the message that punishment is not purposeless cruelty but is meant to restore the social order breached by anti-social conduct. The criminal law is thus a code not only for the potential offender but also for the law-abiding citizen.

More often than not when the term criminal law is used it refers to domestic criminal law governed by the legal system of the country concerned. More recently, there has emerged a discipline on its own right, according to some, or a branched of public international law, according to others, known as international criminal law. The focus of this discipline is crimes under customary international law such as slave trade, traffic in narcotics, counterfeiting, piracy in the high seas; international cooperation in preventing and combatting trans-border crimes such as terrorism, drug-trafficking,

²⁰ The classic distinction between offences under the ordinary law, disciplinary offences, and fiscal offences (such as those under tax law and under customs and excise law) is based on the very nature of each offence.

human-trafficking, money laundering, and cyber-crime; as well as the following nominate crimes under the Rome Statute: crimes against humanity, war crimes, genocide, and aggression, and which fall under the jurisdiction of the International Criminal Court at the Hague.

Increasingly, and correctly so, the term ‘criminal law’ and ‘penal law’ are used interchangeably. However, the nuance in the two terminologies is that the former denotes an emphasis on ‘crime’ whereas the latter emphasises penalty or punishment. It is significant that in the French version of the Penal Code the drafting style of offences consists in foregrounding the prescribed penalty before the actual definition of the prohibited conduct. This technique reflects emphasis on the term ‘penal’. By contrast, the technique of the legal draftsmanship of the English version of the Code is such that each prohibited conduct is first defined before stating the prescribed penalty. This technique reflects emphasis on the term ‘criminal’. The French denotation of that document as *Code Pénal* is correct; an accurate English characterisation of the same document should have been ‘Criminal Code’²¹.

Section 2. The phenomenon of crime

An individual living alone, such as the man Friday was before he met Robinson Crusoe, has no need for any rules of conduct because he does not interact with other human beings. The only limits to his freedom of action are those which are inherent to his nature and his capacities as an individual, as well as those which he consciously, deliberately and voluntarily places upon himself. When individuals find themselves living in community they constitute what is called a society or community. At that moment it becomes necessary to lay down rules of behaviour governing the conduct of members of that society. Such rules are indispensable for social order and for social intercourse. They are critical in ensuring that members live harmoniously and conduct themselves in a manner that does not adversely affect each other. They are also necessary in promoting the interest, welfare and survival of the given society. Any violation by a member of any of the norms of behaviour generally accepted and followed by society is considered an anti-social behaviour affecting society as a whole notwithstanding that the violation directly relates only to the interest of a specific individual or group of individuals. An individual who violates any of the laid-down societal norms is said to have committed an offence or a crime.

²¹ In English-speaking countries the standard terminologies are always ‘criminal law’, ‘criminal code’, and ‘criminal procedure code’; and not ‘penal law’, ‘penal code’, and ‘penal procedure code’.

§1. Crime as a permanent feature of human society

Crime is thus essentially a social phenomenon. It manifests itself only where there is society. It is a permanent aspect of human society. It has been with humans at least since the time Cain murdered Abel. Ancient documents such as the code of Hammurabi, the code of the Hittites, and the Hebrew laws in the Biblical books of Deuteronomy and Numbers all attest to the fact that crime has been a permanent feature of the human world since man started living in civil society.

The writings of philosophers, theologians and men of letters since Antiquity point to the continuing rise in crime rate, though statistics to support this assertion date only as from 1826 when the discipline of statistics was first developed, and in France. The development of human sciences as from the 19th century and the significant increase in crime rates about the same period, witnessed the emergence of a new social science known as criminology.²²

§2. Criminal law and related disciplines

Law is traditionally divided into two broad categories, public law and private law. Criminal law deals with nominate crimes and the general principles governing responsibility for crime committed. It forms part of substantive law and is sometimes considered as part of public law. Criminal procedure, on the other hand, lays down the procedure by which a suspected criminal is brought before a criminal court and tried for his alleged crimes.

There are many similarities between a crime and a tort. In fact the same act, or omission, may constitute a crime and also a tort. But the two are distinguishable. The main distinction between the two lies in the object of the proceedings. The object of proceedings in crime is punishment; that of proceedings in tort is damages. Since crimes are offences against society at large, proceedings against an offender are taken in the name of the state (*The State v. XY*) or in the name of the people (*The People v. AB*) or in the name of the state prosecuting authority who, acting as the representative of the state, is legally empowered to institute criminal proceedings against an alleged offender (*Director of Public Prosecutions v. XY*, or *Attorney General v. AB*).

There are four main disciplines directly related to the criminal law, namely, penology, criminal procedure, criminalistics and criminology.

²² Conklin, op. cit.

Penology. This is the field of criminal science that focuses on the study of punishment and prison management. From the standpoint of view of social protection or social defence the aim of penal law is to punish the offender. But punishment cannot be an end in itself. Penology therefore also enquires into various forms of punishment and interrogates their efficacy in the light of the object to be achieved by criminal sanctions such as retribution, reformation, justice, and public protection. It further investigates into the environment in which penalties are served (prison, borstals and so on) and the adaptability of a given penalty to a particular offender or cohort of offenders.

Criminal procedure. This branch of law is concerned with the procedural steps through which a criminal case passes, commencing with the initial investigation of a crime and up to the acquittal or conviction and sentence of the accused, as well as the appeal process. Moving from abstract stipulations to concrete enforcement of the rules of criminal law is not a mechanically process. No system requires law enforcement officials to arrest a suspected offender and then simply proceed to impose on him the penalty provided by law for the crime allegedly committed. A system that allows for that would be inimical to the freedom and civil liberties of individuals. In every civilised society, the need to protect both the interest of society and that of the individual have necessitated the development of a special procedure by which the culpability of an accused person is reliably established before an appropriate sanction provided by law can be inflicted on him. There is a temporal distance between the time of commission and investigation of an offence, on the one hand, and the time of acquittal or finding of guilt and sentence (a period that may extend to the further stage of appeal), on the other hand. All the prescribed activities from beginning to end, that is, from criminal investigation to final disposal of the case constitute what is known as criminal procedure. Criminal procedure is another field of criminal science and, like penology, it is also of considerable academic interest.

Criminalistics or forensics. This discipline is also known as forensic science or forensic pathology. It is the science of crime detection, based upon the application of chemistry, physics, biology, physiology, psychology, and other applied sciences. Being the science of crime detection, criminalistics is concerned with forensic science and forensic pathology both of which serve the needs of the police and the courts in crime detection and crime prevention. In some jurisdictions therefore, the term 'forensics' is more in use than 'criminalistics'.

Criminology. Criminology²³ is the scientific study of crime, the aim of which is to achieve greater understanding of crime. The discipline of criminal law deals with crime purely from a legalistic approach: general principles governing criminal responsibility and the elements prescribed by law as constituting a crime. Criminology, by contrast, is concerned with “the study of crime and criminal behaviour from a sociological and psychological perspective, seeking to understand the underlying causes and effects of criminal behaviour in society, and methods of controlling and preventing them.”²⁴ With that greater understanding criminology seeks to announce the fight against crime by investigating into its causes, origins, processes and consequences. Criminology focuses attention on the offender as a person as well as on the physical and social environment in which crimes are committed. The major areas of criminological focus are sociology of law (which seeks to understand why some acts, but not others, are made the subject of criminal law), the study of social response to crime, and the theories of crime causation (criminogenesis).²⁵ Criminology is thus essentially concerned with the scientific study of crime, criminals and criminal behaviour. It draws extensively from the contributions of extra-legal disciplines such as medicine, psychology, sociology, psycho-analysis, psychiatry and other social sciences.

The criminologist is not concerned with who committed a crime. He is concerned more with how and why crimes are committed, and with providing proof of guilt.²⁶ His focus is on those aspects of human behaviour regarded as criminal because they are prohibited by the criminal law. His focus is also on such aspects of socially deviant behaviour as are closely related to crime. Criminology is a multidisciplinary subject which is of interest to psychologists, sociologists, statisticians, criminal law scholars, psychiatrists, and psychoanalysts. The origin of this discipline may be traced to the book, *L'Uomo Delinquente* (*The Criminal Man*), published in 1876 by the Italian physician, Cesare Lombroso. The term ‘criminology’ itself was coined by another Italian, Raffaele Garofalo, a judge, who in 1897 published a book on the subject simply entitled *Criminology*.

Criminology offers two broad explanations of criminal behaviour, endogenous and exogenous factors.²⁷ Endogenous factors of crime are those within the individual himself. They consist of certain characteristics of which

²³ Hall Williams, *Criminology and Criminal Justice*, Butterworths, London, 1982; Conklin, op. cit.; Barnes HE et al, *New Horizons in Criminology*, Prentice Hall, 1959.

²⁴ Kemp G et al, *Criminal Law in South Africa*, OUP Southern Africa, 2012, p.5.

²⁵ Reid ST, *Crime and Criminology*, 5th ed., Holt, Rinehardt & Winston, New York, 1988, p. 37.

²⁶ Conklin, op cit.

²⁷ Idem

some are innate and others acquired. Innate characteristics are those which mark the individual from birth such as race, temperament, individual mental processes, sex, and chromosome anomalies. Acquired characteristics would have been gotten voluntarily²⁸ or involuntarily²⁹. Exogamic factors of crime, on the other hand, are those which exist in the environment in which the individual lives and which influence his behaviour. Some of these are physical surroundings such as geography, climate, the seasons, demography or population, settlement patterns including the urban/rural dichotomy. Other exogamic factors include the economic environment, the family, social and cultural surroundings.

Criminology identifies at least three social sources of the criminal law, namely, moral indignation, distribution of political power and economic resources, and social consensus. Firstly, some acts are made criminal on the grounds that they are morally objectionable. Acts that evoke moral indignation or a sense of outrage are punished. Secondly, the criminalisation of certain acts is not necessarily a reflection of the moral indignation of society as a whole but rather it could be a reflection of the distribution of political power and economic resources in the society. Those with power and resources in a given society determine to a large extent which types of behaviour will be criminal. In a capitalist nation, the criminal law reflects, to a large extent, the will of the economic elite and so behaviour that threatens the interests of that elite is sanctioned. In an authoritarian state, the criminal law is apt to reflect an obsession with concerns for the protection of the power and persons of those in power. Thirdly, the criminalisation of some acts represents social consensus on the desirability and necessity for punishing them. Here, the law reflects the shared values and norms of society as a whole rather than the norms and values of particular groups in society. Generally, therefore, the criminal law is greatly influenced by a variety of interest groups such that the bases of some laws are moral and others are economic.

²⁸ Voluntarily acquired characteristics include alcoholism and drug addiction.

²⁹ Involuntarily acquired characteristics include physical and psychic transformation due to growth, as well as organic illnesses.

Criminal Justice in Early Society

The history of the origins of the criminal law¹ attest to a painfully slow development and a sorrowful saga of man's cruelty and inhumanity to his fellow man. The story has been the same in all corners of the earth. Since man began living in civil society he has attempted to systematise methods of dealing with individuals who commit acts deemed harmful to his community. For example, for thousands of years death was the most common form of punishment in all societies. Its object was the elimination from society of persons considered incorrigible and dangerous, a kind of sanitization of society.

From legends, folklore, written literature, and holy books, one may distinguish the following broad periods in the evolution of criminal law in society; the period of un-institutionalised criminal justice and early codification, on the one hand, and the period of institutionalised criminal justice, on the other hand.

Section 1. Un-institutionalised criminal justice and early criminal codes

The period of un-institutionalised criminal justice, otherwise known as the period of self-help punishment, was marked by private or group vengeance.

§1. Self-help punishment

This was a period where an offended party (an individual or a group) took action in person or through a representative by exacting from the offending party (an individual or a group) such punishment as he felt satisfied his sense of justice.

Collective reprisals. In early society punishment was inflicted by the elementary social unit, the family, the clan, or the tribe. If a crime was committed within the same family or clan the offender was punished by the

¹ Lofton J, *Justice and the Press*, Beacon Press, Boston, 1966, pp. 36 et seq; Stefani G, Levasseur G & Boulloc B, *Droit Pénal Général*, Précis Dalloz, Paris, 1992, pp. 44-53, 61-78; Merle R & Vitu A, *Traité de Droit Criminel*, Tome I, 6th ed., Cujas, Paris, 1988, pp. 98-144; see generally, Bouzat et Pinatel, *Traité de droit Pénal et de Criminologie*, 3 vol., Paris, 2nd ed., 1970, revised 1975; Hall Williams, *Criminology and Criminal Justice*, Butterworths, London, 1982.

head of the family or clan. He did so in exercise of his responsibility, as head, to ensure harmony and peace within the group. If, however, a family was wronged by someone outside the family, punishment took the form of private or collective reprisal or vengeance: individual against individual, family against family, clan against clan, tribe against tribe. The reasoning was that the group was necessarily offended by a wrong committed against one of its members: one for all, all for one. This was socially acceptable because it was considered a moral duty to preserve the honour of the individual, his family and his clan. In those days, responsibility was collective and punishment was also collective.

The right to avenge was vested in the wronged group. Often, there was no proportionality in the punishment exacted by the avenging group. This provoked counter-reprisal from the other group which in turn prompted yet another reprisal by the first group, and so on. Collective reprisal thus often led to a chain of private wars between family groups, of which the Italian vendetta was, for a long time, a vestige.² Vengeance could be carried out against the offender personally, or against his descendants, or against his relatives for generations ‘until blood washed away blood’, sometimes long after the original reason for the conflict has been forgotten. Successive retaliation by one group against another sometimes led to the extermination of the vanquished group or to communal self-destruction.

Noxa delivering up. A significant development in this system of collective vengeance was that the group to which the wrongdoer belonged could disclaim responsibility for the unlawful act committed by its member. In order to avoid collective punishment the disclaimer of responsibility had to be accompanied by delivering the offender up over to the offended group. This was known as ‘*nox*a delivering up’, and was a common practice in ancient civilisations. The practice marked the transition from or watershed between the collective responsibility of the group and the personal responsibility of the offender. With time vengeance made way for ‘the right to claim restitution’. The offended group, as the one with the right to punish the wrongdoer, arrogated to itself the option to pardon the said wrongdoer upon payment of compensation (or ‘blood money’) by the group to which the wrongdoer belongs.

Payment of compensation to the victim of crime. The emergence and assertion of the centralised authority of a wider social group such as the chieftdom, the kingdom, the state or the empire, saw limitations being imposed

² An idea of the vendetta may be gleaned from the movie, *The Godfather*, which depicts the head of a Mafia family who oversees successive revenge against a rival criminal family.

on private vengeance until it eventually disappeared altogether. The leader's authority within the family slowly declined. In ancient Rome, for example, the family head, the *pater familias* (literally, father of the family), had the power of life and death over his children and slaves. This power disappeared progressively with the growth and increased authority of Rome as a City State. Early organised society imposed a system of compensation requiring the payment of a fine, in kind or in money, by the offender to the victim. Under this system the offender or his family was obliged to compensate the victim or the victim's family which had to accept this redemption fee. Finally, the state asserted its authority by creating new offences (those against public order and religious taboo) which were visited with the death penalty: stealing, destruction, arson, adultery, rape, desertion, treason, *lesa majestas* (high treason), sacrilege, blasphemy, heresy, witchcraft; offences against liturgy, religious discipline and the faith. As may be observed these offences were of two broad types: those based on public values and morality, and those based on religious beliefs and practices.

§2. Early criminal 'codes'

Such was the state of the development of the criminal law up to around the period denoted in European history as the Middle Ages (i.e., roughly the period from the fall of the Western Roman Empire in 476 AD to the Italian Renaissance). Thereafter, some societies that had developed the art of writing as well as some that had not yet developed that art promulgated laws punishing certain types of conduct and prescribed a scale of penalties as well as a mechanism for dealing with offences. These developments were particularly fruitful in the Mediterranean region which soon established itself as the font of Western civilisation and the source of its laws.

Hammurabi's code. The Sumerians were one of the first peoples to have written criminal laws.³ As early as three thousand years B.C. King Hammurabi (circa 1947-1905 B.C.) promulgated a code of 282 laws regulating the conduct of his people. Hammurabi's code covered sexual misbehaviour, personal violence, sorcery, and a scale of penalties for specified crimes. The penalties were very harsh and certain crimes were subject to trial by ordeal. Capital punishment was commonly imposed even for relatively minor offences. The *lex talionis*, the law of retribution which required the infliction upon a wrongdoer of the same injury which he has caused to another, was enshrined in Hammurabi's Code. It came to be expressed in the ancient Mosaic-law

³ Idem

formula of ‘eye-for-an-eye, tooth-for-a-tooth’. On the whole, Hammurabi’s Code reflected progress in the evolution of the criminal law because the laws were written and judicial settlement replaced the law of blood revenge. The *lex talionis* was later proscribed. In the 14th century B.C. the Assyrians adopted and revised for their own use the Babylonian laws codified by Hammurabi.

Egypt also had written laws hundreds of years before the Macedonian conquest of 332 B.C. and the Roman conquest of 30 B.C. In 50 B.C. Queen Cleopatra and her brother Ptolemy passed a decree prescribing the death penalty for certain types of conduct. In another part of the Mediterranean world, the Greeks (Athenians) eventually developed a criminal law that lifted their law above the level of blood feuding. In the 7th century B.C., Draco systematised legal procedures and created courts of justice under responsible state officials. The harshness of an earlier primitive law was continued in that the death penalty was imposed even for petty theft. Nevertheless, Draco’s code reflected an advance in legal thinking in that it distinguished between voluntary and involuntary homicide. Solon (circa 639 – 55 B.C.) gave Athens the popular tribunal elected by universal suffrage and open to all citizens. The tribunal was the final court of appeal from decisions of the aristocratic chief magistrates. This was the beginning of the popular jury system that came to be established hundreds of years later in England and the United States of America.⁴

The Mosaic laws. The ancient criminal code that is probably most familiar in Western countries is that of the Hebrews. It is otherwise known as the Mosaic Law which is found in the Old Testament of the Holy Bible. The Biblical context of this law has given it the aura of an original promulgation. But that law actually stemmed from the precedent of the Babylonians under King Hammurabi. There were some thirty-five points of similarity between the code of Hammurabi and the fifty laws in the old Hebrew Book of the Covenant⁵. The two codes were remarkably similar in their prohibitions against theft, kidnapping, sorcery, incest and other sexual deviance such as homosexuality and bestiality, bribery, false witness, and perjury. Both codes valued property more than human life, emphasised capital punishment, and legalised the principle of revenge.

Laws by King Muh of China. A system of organised justice also emerged in other parts of the world. In China, for example, as far back as the time of the reign of King Muh (circa 961-906 B.C.), enlightened directions

⁴ Idem

⁵ Exodus 20: 23-32; 33.

were promulgated for those who presided over criminal cases throughout the empire. Yet, as in other parts of the world, the family-blood feud persisted, and was sanctioned even by Confucius (551-479 BC), the great Chinese sage and philosopher who emphasised moral order.

Customary legislation in Africa. There were similar developments in pre-colonial sub-Saharan Africa, especially in the centralised societies like the Ashanti Kingdom, the Benin Kingdom, the Buganda Kingdom, the Bunyoro Kingdom, the Matabele Kingdom, the Songhai Empire, the Yoruba Kingdom and the Zulu Kingdom, although the available evidence is rather scanty and much of it anecdotal in the form of oral tradition.

“We may now proceed to consider in some detail the nature and methods of legislation under African customary law. It is of course necessary to remember that the absence of writing rules out the existence of documentary codes of law such as are the enviable possessions of the Assyrians, the Babylonians and their imitators and successors in the art of codified law. This makes it inevitable that our discussion of the African efforts in legislation has to be limited to more recent times of which we have some record. But it does not follow that their legislative enterprise is only of recent date. What we do know of it is in itself sufficient as a testimony to what must have been going on centuries earlier: it is, as someone has aptly described it, a ‘concentration of past experience’. In this connexion a very salutary reminder was given [by Dundas]... in these words: ‘Customary law ... is a deeply-thought-out code, and the experience and intellect of generations have worked to make it one link in a chain of usages and ideas. For the law as approved by custom is but part of the mechanism of society.’ We see then that the absence of ancient written codes or of early records of written laws in Africa does not necessarily presage a static condition of the customary law, nor are we justified in refusing the name of legislation to such processes of legal change as are to be found operating in African societies in various stages of their legal life.”⁶

⁶ Elias, T.O., *The Nature of African Customary Law*, Manchester: Manchester University Press, 1956, pp. 188-189. The author cites, for the in-text quotation, Dundas, “The Organisation and Laws of Some Bantu Tribes in East Africa,” *Journal of the Royal Anthropological Institute*, 1915, vol. 45, p. 234.

The King verbally promulgated laws, what Elias calls ‘customary legislation’⁷, governing the conduct of his people. Violators were tried by a council of elders presided by the King and were ordered to make reparation and, in appropriate cases, punished. Compensation or restitution and reconciliation played a large part in the process.

Section 2. Institutionalised criminal justice system

Throughout history the fate of offenders has always rested almost entirely on the wisdom and compassion of their judges.⁸ In ages past there were laws on forbidden conduct. But there was no well developed body of procedural rules to guide the administration of criminal justice in the interest of the accused as well of society. When society became more enlightened in the process of social development man realised that unless the impulse for revenge against the supposed malefactor was controlled it could lead to communal self-destruction since the culprit might have friends who would side with him to do battle against his pursuers. This realisation led to the organisation of a kind of tribunal to hold something comparable to a hearing and pronounce a judgment that would be acceptable to the community.⁹ The development of the tribunal, the bases and forms of punishment, and the prison, marked the beginning of institutionalised criminal justice.

§1. The early tribunals

In the very early stage of this development in Greco-Latin communities the tribunal consisted of the whole tribal group. It dispensed justice in disputes between families or clans or between members of different families or clans. But it left intra-family or intra-clan squabbles to be settled by the head of the respective groups. As the community became more elaborately organised, the tribunal was administered by the individual ruler or a person or a group deputed to act in his place. The tribunal reached its decisions by its own mental processes, without the assistance of experts or elders acting as advisers. It was much later that elders or other specially designated advisers, versed in the tradition of the community, came to be relied on to guide the tribunal in its deliberations. After the assessor or legal adviser of the tribunal, the rise of the partisan advocate was a natural development. Originally, the advocate, ancient predecessor of the lawyer, merely spoke on behalf of the accused or, as

⁷ Elias, *The Nature of African Customary Law*, p. 191.

⁸ Lofton, *op. cit.*

⁹ *Idem.*

was the case in classical Greece, wrote a speech which the accused himself read.

“[I]t is not known exactly when the profession [of advocate] began. It was probably evident in the 4th century Attica among the orators and the rhetoricians who wrote speeches for parties to deliver in court. In Ancient Rome there existed the institution known as *advocatus*. The *advocati* were friends of litigants whom they defended in their lawsuits. Among the *advocati*, the most eloquent and best in the science of law were styled *oratores*. By the time of the Roman Empire the orator-friend, an amateur who rendered his services *gratis*, had become a paid professional orator. The modern advocate is therefore more directly a successor to the orator than to the juris-consult of Rome. In England in Norman times it was common for a litigant to have assistance in the conduct of his case by a friend not by a professional expert. The friend’s function was to recite the formal words necessary in the making of a claim or a defence. The reason for having a friend was that if he made a mistake the party would disown the case with impunity whereas if one party were to make an error himself, it would be fatal to his case. More expert assistance arose when court procedure, developed by courts which enforced it, became very complicated. As a consequence the friend of the litigant became a professional pleader or narrator who conducted oral pleadings and argued questions of law on behalf of his client. It is from the narrator that the barrister of present times is descended.”¹⁰

However, it was not as if the accused had the right to be assisted by counsel. It was only many centuries later that it was recognised that the accused has a right to counsel.

Similarly, the establishment of guilt or innocence by well defined rules of evidence was a late development in law. Such evidentiary rules as may have existed, if at all, must have been extremely limited. The early tribunal considered whatever the parties said or produced by way of proof.

¹⁰ Anyangwe C, *The Magistracy and the Bar in Cameroon*, CEPER, Yaoundé, 1989, p. 103; Sawyer G, *Law in Society*, OUP, 1965, p. 110; Siré P, ‘The Legal Profession and the Law: the Bar in France,’ J.I.C.J, vol. 1, No. 2, 1958, p. 244; Boulton W, ‘The Legal Profession and the Law: the Bar in England and Wales,’ J.I.C.J, vol. 1, No. 1, 1957, p. 106. In pre-colonial Africa there existed the system of representation of a litigant at a trial by a blood relation with a tried aptitude for eloquence and clarity of exposition; then latterly the system of champions-at-law, orators who assisted parties in litigation, ‘hired’ for their eloquence and glib tongue.

“In the history of almost every society, the accused was subjected to one of the endless forms of ordeal, through which the deity was supposed to intervene and provide a sign of the sufferer’s guilt or innocence. Grounded in popular superstition but sanctioned by the church sometime after 400 A.D., the ordeal in Europe took five or six forms. In an elaborate ceremony, with priests participating, the defendant might be put to the test of the hot iron or boiling water or fire. If he emerged, presumably through divine intercession, in the prescribed condition, he was deemed innocent. In time the public lost confidence in the ordeals. And in 1215 Pope Innocent III forbade their use in church tribunals. In 1219 King Henry III outlawed the ordeals in England. In medieval times the culpability of an accused was sometimes determined through trial by battle, in which he fought with his accuser, or trial by compurgation, in which kinsmen or neighbours took an oath that they believed he was telling the truth in proclaiming himself innocent. Such trials were still being held in the 14th century.”¹¹

The jury was one of the earliest instruments of the trial process.

“It derived from the primitive popular tribunal and was adapted by the Germanic tribes as a more specialized vehicle of taxation and law enforcement. The king’s representatives would summon a body of leading citizens and take from them a statement as to the taxable wealth of the community, the condition of public order, and the nature of offences against the king and his laws. The group of citizens was called the *jurata* and its report to the king, a *verdictum*.”¹²

Following the Norman conquest of England in 1066 the jury system was introduced in that country. It took definitive form as a grand jury in the 12th century and as a petit jury in the middle of the 14th century. The grand jury consisted of varying numbers of country gentlemen summoned before a royal deputy and questioned as to what they knew about persons accused of crimes in their neighbourhood. In order to remove possible fear by jurors of retribution by some powerful violator, at least twelve jurymen had to agree on the accuracy of the report. Sometimes the grand jury also acted as a trial jury. But the trial or petit jury soon became a separate body. By 1600 trial by jury had become, and continues to this day to be, the usual mode of trial in the common law courts of England. By the 17th century jurors began to decide

¹¹ Lofton, op cit., p. 40.

¹² Ibid, pp. 40-41.

cases on the basis of testimony of witnesses presented under rules of evidence, rather than giving a verdict based on their own knowledge. At first the only witnesses called were those for the prosecution, but gradually the accused acquired the right to call witnesses as well and to testify as witness in his own behalf.

In England, judges at first were royal clerks who held office at the king's pleasure and up to the 13th century the judiciary was largely manned by clerics. It was only in the 14th century that the practice of naming professional lawyers to the bench became common.

“Until comparatively modern times, once a case was heard, a quick decision was demanded as a result of the emotion of the community and the insistence of the injured party on prompt redress. The possibility of error and the value of delayed deliberation were given little weight. In England, as late as the 1700's, only a week elapsed in some criminal cases between perpetration and execution. And the appeal as a matter of course in criminal cases did not come into the law until the 1800's. While the judgment was oral among primitive peoples, some communities began the practice of recording such decisions as soon as the art of writing developed. The preservation of written judicial records led naturally to the formation and observation of a body of precedents in law.”¹³

§2. Bases and forms of punishment

Punishment through the ages has always been harsh and reveals the baser side of man. In early times the primary purpose of punishment was to placate the gods because crime was mainly attributed to the influence of evil spirits. Sometimes the wrongdoer was ceremonially killed by the whole community to propitiate the gods. As noted earlier the punishment of private crimes was left to a blood feud between private parties, with a murderer, for example, escaping unscathed unless the victim's immediate relatives took up the cause and settled the score with the offender. Sometimes they did so by inflicting greater wrong, which then provoked angry counter-retaliation from the other side, then yet another retaliation of the first side and so on and so forth. However, a system of compensation was sometimes substituted for the blood feud, with fines or money payments providing restitution for the individual wrongs.

With the absorption of the concept of sin into the criminal law restitution for crime was no longer accepted. Many offences ceased to be regarded as

¹³ Ibid.

mere torts which could be settled by compensation. Penance was required for all crimes. The notion of sin took hold and crimes came to be regarded as the voluntary acts of free moral agents. Society reacted by inflicting punishment designed to deter such wilfully perverse challenges to God. The eye-for-an-eye concept was considered effective in preventing the offender from repeating his crime. This was the early beginning of the retributive theory of punishment. For, the retribution rationale is commonly associated with *lex talionis*. Punishment was therefore inflicted proportionately, however crudely, to the harm done. However, the rationale for punishment was not the same in lay and ecclesiastical courts.

In the lay courts punishment was based on the concept of deterrence¹⁴. The object of punishment was to eliminate offenders and to intimidate or deter potential violators of the law through the imposition of harsh penalties on offenders. The lay courts publicly inflicted barbaric and atrocious forms of punishment that included death by decapitation or hanging, bodily mutilation, exposure to inclement weather, pillory, branding, burning to death, and the ordeal of being held up to public scorn¹⁵. In medieval times spies had their eyes gouged out, perjurers had their tongues torn out, rapists were castrated, thieves had their hands cut off, adulterers were made to run through the town naked, etc. Some offenders were assigned to toil on galleys. When the sailing vessel replaced the galley, this place of forced labour was removed. Authorities then began shipping criminals to faraway places to perform disagreeable work. France sent its convicts to the notorious Devil's Island off the coast of French Guyana. Britain sent its own convicts to the American colonies, Australia and New Zealand.

In the ecclesiastical courts, by contrast, punishment was based on the concept of retribution. Offenders were punished because they deserved to suffer for the harm they had inflicted on others. Punishment was the wages of crime and therefore had to be proportionate to the gravity of the offence committed. Moreover, the offender deserved to be punished because he has sinned; he deserved punishment because he committed a crime or fault: *punitur quia peccatum est*. On this rationale, the church rejected the death penalty and mutilating corporal punishment. Instead, it preferred systematic incarceration as punishment because this was considered more appropriate in getting the offender to amend his erring ways. Punishment is for crime committed (*punitur ne peccetur*) but it also had to be geared towards reforming the criminal.

¹⁴ Expiation, atonement, and penance served deterrent goals.

¹⁵ This was by public humiliation on the hurdle, in the pillory, or otherwise on exhibit. See, Andrews W, *Old Time Punishments*, Dorset Press, New York, 1991.

§3. The early prison

The practice of confining people guilty of anti-social behaviour or other misdeeds in dungeons or other place of bodily restraint goes back thousands of years. But it is only in comparatively recent times that the prison or jail emerged as a facility for systematic confinement as punishment for crime.¹⁶ The 16th century in Europe witnessed the decline of guilds, the breakup of the feudal system, increases in the number of paupers and beggars idling around, and an upsurge in criminality. The English faced this problem by establishing a workhouse in London in 1557 to absorb the loafers. The workhouse served an economic purpose in that the inmates had to work, but it also involved an element of punishment since inmates could be whipped, under-fed or tortured.

The prison, as a place of restraint for those convicted of violating the law, can thus be traced, in England, to the workhouse, and, in Roman Catholic countries, to the monastery and the convent. By the 18th century the prison, whether maintained by private keepers or by government as a public facility, had come into general use. Early prisons were often dark, cramped, airless, disease-ridden, and providing wretched food and living conditions. In England, John Howard¹⁷ made the cause of improving miserable prison conditions an international personal crusade. After visiting many prisons in Britain, Europe and the Middle East he published accounts of his findings detailing torture chambers, the degradation of prisoners and general barbarous treatment. This helped to spark a movement for more humane care of institutionalised persons.

¹⁶ Barnes HE, *The Story of Punishment: A Record of Man's Inhumanity to Man*, Montclair, New Jersey, 1972. This book, originally published in 1930, gives a vivid account of the development of prisons. Also, see generally, Cross R, *Punishment, Prison and the Public*, Stevens & Sons, London, 1971

¹⁷ 1726-1790.

History of European Thought about Crime

From about 1500 to about 1750 the nature of crime became a subject of intense inquiry by a number of philosophers who came to be known as pre-classical thinkers. These were St Thomas Aquinas, Thomas Hobbes, John Locke, Jean Bodin, Baron de Montesquieu, Jean-Jacques Rousseau, Martin Luther, Machiavelli, Condorcet and Voltaire. What these thinkers had in common was their belief in an original state of nature free from the constraints of social and political institutions.¹ All of them saw ‘free will’ as a psychological reality. This meant that people were free to choose their own behaviour. The idea that people freely chose how to act had two implications. First, people were responsible for the consequences of their behaviour. Secondly, people could be controlled through fear, especially the fear of pain. When the state inflicts punishment, the primary object in doing so is to create fear and thereby to prevent behaviour that violates the law.²

Section 1. The classical school of criminal justice philosophy

The ideas of the pre-classical thinkers formed the basis of the classical school of criminal justice philosophy under the influence of the Italian, Cesare Beccaria, and the Englishman, Jeremy Bentham. More importantly, the scholarship of the classical school thinkers was a reaction against the unjust criminal justice system of the time.

“The classical theorists were rebelling against a very arbitrary and corrupt system of law in which the judges held an absolute and almost tyrannical power over those who came before them. The law was applied unequally; corruption was rampant. Confessions were obtained by means of torture, and the death penalty was used for many offenses.”³

According to this school punishment should fit the crime, being no more or less severe than is necessary to deter the criminal and prevent crime. The classical school assumed that criminal behaviour is essentially a rational act. It assumed that people rationally choose to act the way they do after making a

¹ Conklin, JE, *Criminology*, Macmillan, New York, 1981, pp. 75-76.

² Idem.

³ Reid ST, *Crime and Criminology*, 5th ed., Holt, Rinehardt & Winston, New York, 1988, pp. 82-83.

calculation of the relative risks and gains involved. It reasoned that the tariff of penalties should be adjusted so as to make the risk unacceptable, but that it should not go to the extent of inflicting unnecessary suffering.

The unchallenged leader and towering figure of the classical school was Beccaria⁴. He studied in Paris. In 1764, at the age of 26, he published in Milan his treatise, *On Crimes and Punishments*⁵, in which he advanced his liberal approach to criminal law. After studying the scale of penalties existing at the time Beccaria concluded that they were too harsh. In a humanitarian cry of protest against the severity of the criminal law, Beccaria pleaded for a rationalisation of the system of criminal justice and a reduction of the penalties.

§1. Mild but certain and unavoidable punishment

Beccaria was bitterly critical of the criminal justice system of his time under which courts were very generous in meting out arbitrary, harsh and cruel punishment, including torture. He was opposed to the death penalty. He contended that general deterrence⁶ would be better achieved through the certainty of unavoidable mild punishment rather than through punishment that is intimidating but the application of which is uncertain. The goal of crime prevention, he argued, should be pursued by meting out punishments which make the strongest and most lasting impression on the minds of people, but which at the same time inflict the least torment on the body of the criminal. He was of the view that punishment should be as certain as possible and only as harsh as is necessary to deter potential offenders. Anything else beyond these considerations would be superfluous and for that reason tyrannical.

Beccaria thus felt that penalties should be consistent with the idea of retribution or just deserts. He argued that the certainty of punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity. Thus, certainty of punishment for a crime is probably more important than the maximum statutory penalty for a crime or the length of the sentence meted out by the court.

§2. Promptness of punishment

Aside from the severity and certainty of punishment, the promptness with which punishment is administered also seems to affect the deterrence of

⁴ 1738-1794.

⁵ This book was published under its Italian title *Dei Delitti e delle Pene*.

⁶ The idea is that through the punishment of individual offenders one arrives at inhibiting among the general population desires to engage in crime.

criminal behaviour. The closer in time the punishment is to the crime, the less delay there is in inflicting punishment, the more likely will be the avoidance of the behaviour that elicited the punishment. Beccaria wrote,

“The promptness of punishments is more useful because when the length of time that passes between the punishment and the misdeed is less, so much the stronger and more lasting in the human mind is the association of these two ideas, crime and punishment; they then come insensibly to be considered, one as the cause, the other as the necessary inevitable effect.”

Beccaria also laid emphasis on the reformation of the offender and to the offender's return to a normal and honourable life in society. He however paid more attention to the social harm which the offender's crime produces than on the offender's intention. He consequently advocated a system of objective equality in the infliction of punishment. An admirer of Rousseau and Montesquieu, Beccaria took over their social contract ideas and posited that the right to punish was based on the social contract.

§3. Principle of legality of crimes and of punishment

From the social contract theory, Beccaria deduced two major principles. The first principle is that of the legality of crimes and punishment. According to Beccaria, the social contract vests in the state the right to punish. However, the state can exercise this right only within the limits determined by law, the law being the expression of the general will. As the expression of the general will, only the law may determine which act should be criminal and which penalties should be inflicted. Beccaria reasoned that only laws may determine the punishment corresponding to crimes, and this power can only be exercised by the legislator who represents society as a whole bound by the social contract. The law must be written and clear so that when it is put in the hands of anyone, it will enable him to know the limits of his freedom and to calculate the risks inherent in the transgression of the law. From the point of view of procedure, Beccaria's principle of legality implies that an accused person must be presumed innocent.

§4. Crime and punishment to be based solely on harm to society

The second principle adumbrated by Beccaria was that acts should be made criminal and penalties inflicted only when necessary. By that he meant that an act should be made criminal only when it is harmful to society. Beccaria declared that,

“For a penalty to cease from being an act of violence of one man or of many people against a citizen, it must, in essence, be public, prompt, necessary, the least severe possible in given circumstances, always proportionate to offences, and never meted outside the law.”

Beccaria’s work actually focused more on what is today denoted as penology (the treatment of crime by the criminal justice system) than on criminology (study of the causes of crime). Like social contract theorists, Beccaria believed in a contractual society formed by man to escape from an intolerable state of perpetual fear and conflict. He also believed that man had assigned power to a ruler and that punishment was needed to prevent people from usurping the ruler’s power and violating the law. He argued that the source of the law and of punishment should be parliament rather than judges. He thus rejected the English concept of judge-made law. For him, judges should determine guilt while criminal penalties should be determined by parliament because the state had the right to punish violators of the law. He believed that people in their action are motivated by pain and pleasure and that they exercise free will, rationality, and responsibility in their choice of actions. Fear of punishment would thus lead them to choose to conform to the law.⁷

“His underlying philosophy was free will. He maintained that behavior is purposive and is based on hedonism, the pleasure-pain principle: human beings choose those actions that will give pleasure and avoid those that will bring pain. Therefore punishment should fit the criminal. This hedonistic view of conduct implies that the laws must be clearly written and not open to interpretation by the judges. Only the legislature can specify punishment. The law must apply equally to all citizens; no defences for criminal acts are permitted. The issue in court is whether a person committed the act; if so, the particular penalty prescribed by law for that act should be imposed. Judges are mere instruments of the law, allowed only to determine innocence or guilt and thereafter to prescribe the punishment. Under this system the law is rigid, structured and impartial.”⁸

Beccaria argued that punishment should be based on the harm that was produced by the criminal act to society rather than to the victim of the crime. Harm was to be judged by the consequences of the act rather than by the intention of the offender. By making punishment proportionate to the harm

⁷ Conklin, p. 76.

⁸ Reid, op. cit., pp. 83-84.

done judges would be limited in their power to mete out punishment and the arbitrary nature of punishment would be decreased. Implicit in Beccaria's work is the notion that similar crimes should be punished in the same way. This idea suggests that the background and characteristics of an offender should not be taken into account in meting out punishment and that the circumstances of the crime should also be ignored by the judge.⁹

Beccaria's ideas were heavily criticised by some criminal lawyers in France at the time. The weaknesses identified in his ideas were mainly the rigidity of his concepts and the lack of provision for defences to criminal acts. However, most of Beccaria's ideas were vindicated by the outcome of the French Revolution. Those ideas directly inspired the 1789 Declaration of the Rights of Man and the Citizen, legislation passed by the French revolutionaries in 1791, and the drafting and adoption of the French Penal Code of 1810. Moreover, Beccaria's book contains almost all modern penal reforms. It laid the foundation for subsequent changes in criminal legislation. The principle of legality adumbrated by Beccaria is today a fundamental principle of criminal law. For these reasons Beccaria has been considered the father of modern criminal law.

An early example of an attempt to give legislative effect to Beccaria's ideas about crime and punishment was the French Penal Code of 1791. The Code was based on Beccaria's ideas but quickly ran into difficulties in its application. The main problem was that the Code eliminated judicial discretion to such an extent that the special circumstances surrounding a crime or a criminal could not be taken into account by the judge in sentencing convicted offenders. The code ignored differences among offenders and differences among situations that give rise to crime. It also treated first offenders and hardened offenders alike when they were convicted of similar offences. It gave no special attention to offenders who were minors, insane, or retarded. The code was thus subjected to so much criticism that it was revised in 1819. The revised code removed some of the constraints on judicial discretion. It allowed judges to consider the circumstances of the crime but not the offender's intent.

Jeremy Bentham. Bentham was born in England in 1748. He was a philosopher trained in law. A contemporary of Beccaria, Jeremy Bentham published in 1780, his *Introduction to the Principles of Legislation* in which he linked the classical theory of punishment with his utilitarian principle. The notion, canvassed by him, that crimes deserve punishment fixed in proportion to the harm which has been done gained widespread support and publicity.

⁹ Conklin, op. cit., p. 76.

Bentham believed that people act rationally. People perform acts that bring them pleasure, and avoid acts that result in pain. People therefore make rational choices. That being the case 'let the punishment fit the crime.' If punishment for a crime is sufficiently severe people will choose to avoid that act because engaging in it would result in pain that would outweigh any pleasure they might have in committing the crime. Bentham denoted his philosophy of social control as utilitarianism. He stated that an act

“is not to be judged by an irrational system of absolutes but by a supposedly verifiable principle ... [that principle being] the greatest happiness for the greatest number or simply the greatest happiness.”

Jeremy Bentham's lasting contribution to legal philosophy is his principle of utilitarianism and for this, some commentators consider him the greatest legal philosopher and reformer the world has ever seen.

Section 2. The neo-classical school of criminal justice philosophy

Writers who belonged to this school espoused the idea of judicial discretion in sentencing. However, there were those amongst them who, while subscribing to the idea of justice and utility as the bases of punishment, rejected the social contract theory and utilitarianism pure and simple. Further, there were neo-classical writers who devoted attention to the study of the phenomenon of crime; some by tapping into sociology, others by drawing from anthropology, and still others by having recourse to statistical method.

§1. Judicial discretion in sentencing

The advocacy that judges be given the discretion to take into account the circumstances of the crime when passing sentence represented new thinking on the subject of crime and punishment and soon came to be known as the neo-classical position. While agreeing with the validity, generally, of the earlier classical idea of free will, the neo-classical theory posits that responsibility for one's actions could be influenced by individual pathology, incompetence, or insanity. An individual exercised choice of behaviour, but the choice was itself influenced by social and psychological factors. The concept of premeditation was simply a measurement of free will. Age, mental capacity, and the circumstances surrounding a specific crime reduced personal responsibility for one's actions and thus were factors that could mitigate punishment. The testimony of experts could help the courts decide on the extent to which the accused could be held responsible for their behaviour. The neo-classical theory

implied that sentences would have different effects on different offenders. This was the beginning of the rehabilitation rationale of punishment. According to the rehabilitation doctrine the proper goal of punishment is to change the offender so that he will not reoffend in the future.

§2. Justice and utility as the bases of punishment

Among the neo-classical writers Rossi, Ortolan, Charles Lucas, and Guizot deserve mention. Rossi¹⁰ and Ortolan¹¹ were opposed to the social contract theory and to utilitarianism pure and simple. To them the right to punish is based on justice and utility. They argued that given the psychological differences that exist amongst individuals, sentence should vary with the degree of responsibility of each individual. For Charles Lucas¹² the purpose of punishment is to reform and rehabilitate the offender. For this reason Lucas was concerned with the organisation of the prisons system. Guizot¹³, like Ortolan, distinguished between political offences and offences under the ordinary law.

§3. Sociological and anthropological trends in the study of crime

Towards the end of the 19th century two scientific trends regarding work on crime were discernable. One was a sociological trend represented by Quetelet (Belgian), Alexandre Lacassagne (French), Gabriel Tarde (French)¹⁴, and Raffaele Garofalo (Italian)¹⁵. The other was an anthropological trend represented by Cesare Lombroso¹⁶ and Enrico Ferri¹⁷. The sociological trend emphasised the influence of social factors on crime, while the anthropological trend postulated that crime is a phenomenon inherent in all forms of primitive life. Both trends maintained that the criminal responsibility of lunatics and the diminished responsibility of minors left society without any defence against present and future major dangers arising from crime. They pointed out that the criminal law of the classical period paid no attention to the problem of the habitual offender.

These ideas of the neo-classical school were compelling. However, the following essential contributions of the classical school were never challenged. These contributions included the following ideas: punishment should reflect

¹⁰ *Treatise on Criminal Law*, 1829.

¹¹ *Elements of Criminal Law*, 1839.

¹² *The Theory of Imprisonment*.

¹³ *Treatise on the Death Penalty in Political Cases*.

¹⁴ He was a lawyer and sociologist.

¹⁵ 1852-1934.

¹⁶ 1835-1909.

¹⁷ 1856-1929.

the degree of social harm done by the criminal act; the fight against criminality should be by way of imposing punishment; and, criminal responsibility should be based on free will and moral responsibility.

§4. Application of statistical method to the study of crime: the cartographic school

The first efforts to move away from an abstract treatment of crime were based on social statistics that had been gathered in some European countries as early as the 16th century, but which were used to study crime systematically only in the 19th century. Early in the 19th century scholars who began to interest themselves in the phenomena of crime started to collect, analyse, and interpret statistics bearing on the problem of criminality. These researchers are usually classified as belonging to the cartographic school of scientific criminology.

“The cartographic school views crime as a necessary expression of social conditions. Geographic phenomena – including climate (temperature, humidity, and barometric pressure), topography, natural resources, and geographical location – are thought to influence criminal behaviour. Cartographic studies were made possible only when data became available on population distribution, births, and deaths. The systematic collection of such data did not begin until the nineteenth century in France with the work of André Michel Guerry and in Belgium with the work of Adolphe Quételet. Guerry’s work is considered by many to be the ‘first work in scientific criminology,’ and Quételet has been called ‘the first social criminologist.’ Guerry analyzed data on crime by districts within France. He made charts, tables, and maps and looked at the variables of age, sex and education. He also classified crimes as those against property and those against persons. He attempted to identify the factors that predispose one to criminal behavior rather than those factors that cause the behavior. He rejected the simplistic explanations that poverty or increase in population density causes an increase in crime and that education will prevent criminal behavior. Guerry’s work appears to have been the first to use data on crime to test assumptions about the relationship of certain variables to criminal behavior. He also questioned the belief that crime is the result of the moral turpitude of the offender. Like Guerry, Quételet was concerned with patterns and regularity found in the analysis of social data. A statistician, Quételet is sometimes called ‘the father of modern statistics’. Trying to measure social phenomena with

statistics, he published detailed analyses of crime and moral social conditions in Holland, Belgium, and France.”¹⁸

Significant studies based on such statistics were published in 1833 by Guerry, and in 1836 by Quételet¹⁹. Guerry originated the term ‘moral statistics’ in connection with crime figures. He carried out the first ecological or area studies of crime. This approach later came to have great significance. Quételet was one of the first to see that statistical method could be applied to the study of crime. He demonstrated the existence of a certain kind of regularity in the pattern of crime, over the years. Both Guerry and Quételet were important in influencing other researchers in Europe. They were responsible for the beginning of scientific criminology.

“They believed that crime cannot be understood merely in terms of the characteristics of individual offenders; the total environment in which that crime occurs must be studied. These early scholars paved the way for measuring and analyzing crime according to relevant variables such as geography and climate in addition to the more frequently used variables of age, sex, socioeconomic class, and race and ethnicity.”²⁰

These two moral statisticians or cartographers worked independently of each other, but they reached similar conclusions from their analysis of national crime statistics. Both concluded that the annual total of recorded crime in the countries they studied remained fairly constant over the years. They also concluded that the proportion of all the total number of crime formed by each type of crime also remained about the same over time. They thus concluded that officially recorded crime is a regular feature of social activity. They argued that crime is better explained by social factors, including economic conditions, than by individual predispositions. The work of Guerry, Quételet, and other cartographers bears many similarities to modern criminology, but their work did not produce an unbroken chain of theory and research that culminated in 20th century empirical criminology.

Section 3. The Italian positivist school

A number of criminal law writers in the 20th century attempted to fashion a new system of criminal law. These writers belong to three distinct schools:

¹⁸ Reid, op. cit., p. 44.

¹⁹ 1796-1874. He was a mathematician and sociologist.

²⁰ Reid, op cit., p. 44.

the Italian positivist school, the social defence school, and the new social defence school. In fact modern scientific criminology grew more directly out of the work of Italian positivists represented by Cesare Lombroso, Enrico Ferri, and Raffaele Garofalo.

§1. Main ideas espoused

All three writers took the view that it was a legitimate undertaking of criminology to systematically eliminate the free will doctrine canvassed by the classical school. They rejected the doctrine of free will canvassed by the classical school. They instead espoused the doctrine of determinism which for some was physical and for others environmental (psychic, social, or economic). They did not believe crime could be reduced by relying on the criminal justice system. Accordingly, they did not channel their energies in that direction. For them, crime could be reduced only by learning its causes and then eliminating the conditions that were conducive to it. Interestingly, while modern criminology is dominated by this positivist perspective, the criminal justice system and the political domain are both dominated by classical and neo-classical thinking. For example, the classical school's emphasis on free will means that one has to rely on deterrent sentences by the criminal justice system to prevent criminal behaviour.

Positivism, it may be recalled, relies on the scientific method. It emphasises the importance of empirical research. Applied in the social sciences, positivism attempts to quantify and measure behaviour and social conditions associated with behaviour. This method has two main problems when applied to the study of crime. In the first place, legal definitions of crime are not always appropriate for the scientific study of crime. Secondly, many crimes cannot be studied because they are officially 'inexistent' in that they are never reported to or recorded by the police. Critics accuse positivists of being biased in that they implicitly support the existing legal system by their uncritical adoption of the state's definition of what conduct is criminal. Critics also accuse positivists of giving inadequate attention to the vexed question of the origin of the law and the equally vexed question of what is just.

Positivists reply that their quest is for objectivity, that scientific neutrality is possible in the study of crime, and that the focus of such a study should be the criminal and not the criminal law: punishment should fit the criminal, not the crime, as canvassed by the classical school. They reject the claim of the classical school that people are rational individuals who exercise free will and determine their own behaviour. They claim, by contrast, that human behaviour is subject to certain causal laws. Behaviour is determined by forces outside the control of the individual. Positivists thus deny human freedom to choose one's

own behaviour. This perspective conduces to the study of the social, psychological, and biological origins of behaviour. Such research can lead to recommendations for social policies to reduce crime.

§2. Leading exponents – Lombroso and Ferri

Lombroso. The leading exponent of the positivist approach to the study of crime was Cesare Lombroso (1835-1909), honoured with the epithet ‘father of criminology’ because he shifted the study of crime from questions of free will and personal responsibility to a scientific study of criminals. He stressed the need to replace speculation and abstraction with measurement of observation. His training as a physician naturally led him to lay stress on biological causes or theories of crime, anticipating in some ways Darwin’s theory of evolution²¹ and the survival of the fittest and the work of Social Darwinists on the nature of society. In his principal work, *L’Uomo Delinquente*²², Lombroso put forward the very controversial thesis that criminality was largely inherited (the doctrine of determinism) and that criminals could be identified by the shape of their heads and certain other anatomical features, described as *stigmata* (a mark of social disgrace).

The notion that criminals could be identified by certain physical characteristics appeared to have been born out of the idea that criminals were under-developed humans beings driven by greed and that they committed crimes by animal instincts. Lombroso however appeared to have often been intuitive in his work and his method was “largely one of analogy and anecdote from which he drew his conclusion.”²³ An example is this oft-quoted observation he made while examining the skull of a notorious Italian criminal.

“This was not merely an idea, but a flash of inspiration. At the sight of that skull, I seemed to see all of a sudden, lighted up as a vast plain under a flaming sky, the problem of the nature of the criminal – an atavistic being who reproduces in his person the ferocious instincts of primitive humanity and the inferior animals. Thus were explained anatomically the enormous jaws, high cheek bones, prominent superciliary arches, solitary lines in the palms, extreme size of the orbits, handle-shaped or sensile ears found in criminals, savages and apes, insensibility to pain, extreme acute sight, tattooing, excessive idleness, love of orgies, and the irresistible craving for

²¹ Charles Darwin, English naturalist, advanced the theory of the origin of animal and plant species by evolution.

²² *The Delinquent Man*, published in 1876. Another book of his, *Crimes: Its Causes and Remedies*, was translated by Henri Horton and published in 1911 in Boston, Cambridge.

²³ Reid, op. cit., p. 86.

evil for its own sake, the desire not only to extinguish life in the victim, but to mutilate the corpse, tear its flesh and drink its blood.”²⁴

Lombroso's emphasis on measurable characteristics (e.g. facial characteristics) made it possible to determine which factors actually are related to criminal behaviour. He was however attacked by German and French sociologists and proved to be wrong in many ways. As a result, he later modified his views about the relative significance of biological factors in crime causation, downplayed those factors and abandoned the more extreme claims. He then emphasised the role of insanity, poor education, and social background on the causes of crime. Whatever view one may take of the Lombrosian doctrine the fact remains that Lombroso more than anyone else aroused interest in the scientific study of crime. He forced attention away from the discussion of the offence, to concentrate attention on the offender himself and his personal characteristics.

Ferri. Enrico Ferri was one of Lombroso's students. Like his master, Ferri emphasised scientific methodology and positivism. But, unlike Lombroso, Ferri recognised the part played in crime by environmental influences and emphasised the social, economic, and political causes of crime. He took a multi-cause approach to the causes of crime. He viewed crime as an outcome of multiple causes, including climate, age, sex, race, psychology, population density, religion, and political and economic conditions. However, he failed to specify the relative importance of each factor in the causation of crime. Emphasising the social causes of crime, Ferri asserted in his book, *Criminal Sociology* (1881), that

“Man commits crimes not because he willingly decides to do so but because of the fatal tyranny of his organism and his social milieu.”

Unlike Ferri, Raffaele Garofalo, in his *Criminology* (1885), stressed the psychological causes of crime.

The method of the Italian positivist school was not necessarily associated with any particular cause of crime. It was simply a method of study that was used to assess the influence of social, psychological, or biological factors on criminal behaviour. The school advocated the imprisonment of occasional offenders and the elimination (permanent incapacitation) of born criminals, lunatics and notorious or hardened criminals.

²⁴ Quoted in Conklin, p. 79.

Section 4. The social defence school

The school, of which the chief proponents are four, emphasised flexibility in sentencing and the reform and rehabilitation of offenders.

§1. Basic idea: social defence through reform of offenders

The primary pre-occupation of this school was the protection of society against criminals. The Italian positivist school did also deal with the issue of the protection of society against criminals, but its solution was that hardened criminals and habitual offenders should be eliminated. By contrast, the social defence school sought common ground between the classical school and the Italian positive school and came to the conclusion that the best method of ‘social defence’ (that is, protection of society against criminals) was through reformation, rehabilitation (re-socialisation) and education of offenders, particularly offenders who are minors. To this end, the school insisted on the principle of due respect for the human person and argued that effective social defence could be achieved by imposing on offenders preventive measures of an indefinite duration.

§2. Chief proponents

The chief proponents of the social defence school were Count Grammatica (Italian), Von List (German), Prins (Belgian) and Saleilles (French). Of these, Grammatica, a Genoa-based lawyer, occupies a prominent place. His ideas which he started expressing in 1934 were later developed in his book, *The Principles of Social Defence*, published in 1960. Unrealistically, he rejected criminal law as a whole, arguing that the concept of punishment and individual responsibility ought to be dealt away with. He rejected the concept of crime and called for its elimination because, he argued, it is based on an objective assessment of harm whereas, he submitted, all what should matter is the subjective appraisal of the individual.

According to Grammatica the concept of ‘offender’ is highly artificial and should be replaced by the expression ‘anti-social person’. People, he reasoned, are either social or anti-social. For the purpose of societal protection anti-social persons should be subjected to individualised ‘social defence’ measures of an indefinite period. These measures should be imposed *ante factum* (i.e., before the anti-social act), to prevent an apprehended or a threatened anti-social conduct; and they should also be imposed *post factum* (i.e., after the anti-social act), when an anti-social act has been committed. The measures would be enforceable anywhere except in prison.

Section 5. The new social defence school

An offshoot of the social defence school was the so-called new social defence school that emerged in France under the leadership of the academic lawyer, Marc Ancel. Ancel's ideas were expressed in his book, *La Nouvelle Défense Sociale (The New Social Defence)*, published in 1954. This school sought to give criminal law a new dimension by emphasising the need for a liberal and humane criminal law policy that protects the individual against the all-powerful state and that also protects society against the criminal. The new social defence school gave due respect to the existing framework of the criminal law, but drew attention to the need for rehabilitation as the best way of protecting both society and the individual. Marc Ancel felt that it was critical to obtain information on the personality of the offender before proceeding to sentence him and that there ought to be a large degree of flexibility in sentencing. He called for the abolition of the distinction between penalties and preventive measures and its substitution with a single system of social defence measures imposed as the personality of the offender warrants.

The new social defence school did not seek to repudiate the traditional criminal law in its entirety. The school conceded that a legal definition of crime was still necessary. Grammatica, it would be recalled, had argued that measures of social defence of an indefinite duration should be imposed on anti-social persons (offenders). He had also argued that the anti-social person should be subjected to measures of social defence *ante delictum*, i.e. even before he has actually committed an offence. The new social defence school rejected both ideas and called for the abolition of indeterminate sentence (sentence of an indefinite duration). It also called for the curtailment of the scope and effect of the presumption that everyone knows the law. In the view of the new social defence school, the presumption was unacceptable especially in cases of certain so-called 'artificial crimes' (i.e. economic, tax and customs crimes) as opposed to so-called 'natural crimes' or crimes *mala in se* (such as killing, assault, stealing).

Marc Ancel did not subscribe to the concept that motive is immaterial to criminal responsibility. He rejected the theory commonly held in France that the criminal liability of an accomplice or accessory derives from that of the principal offender²⁵. To him, the rehabilitation of an offender was critical in restoring the offender's sense of freedom and responsibility. Ancel saw the problem of crime as an individual problem that could only be resolved by taking account of the personality of each offender. For this reason, he argued,

²⁵ This theory is known in that country as *la théorie de la criminalité d'emprunt du complice*.

it was crucial to study the personality of the offender. Before passing sentence, the judge must study the 'personality file' of the offender. Such a file would contain clinical findings made by a team made up of physicians, psychologists, sociologists and criminologists. After this 'clinical examination' the judge would then have much leeway in deciding on the measure most conducive to the rehabilitation of each offender.

These ideas had some measures of success in influencing the criminal law of some countries. Many criminal law systems require the judge to pay due regard to the personality of the offender and to rehabilitation as one of the purposes of sentencing. For example, the personality of the offender tends always to be taken into account by the court when deciding on whether to suspend sentence, release on licence, aggravate responsibility, or mitigate sentence. Criminal code provisions on post-penal supervision and assistance are concerned with rehabilitation of the offender. Provisions dealing with matters such as confiscation, recognizance, closure of establishment, confinement of addicts and dangerous lunatics in a health institution, and so on are concerned with crime prevention or 'social defence'.

‘Reception’ of Exotic Law¹

A philologist needs a proper understanding of the language of the past in order to study the present. In the same way also a lawyer who embarks on a study of the law under which he lives needs a comprehensive insight in the country’s legal history. This is so because law is an integral part of society, having deep roots not only in the economic and social habits of its members but also in their past and present attitudes.² An account of a country’s legal history, even if only in outline, is important particularly in a country like this one with a convoluted legal history, stretching from the period before salt-water colonisation through the period under successive colonial rule to the present period.

Law in pre-colonial Africa was derived from custom, the custom of each community or chiefdom. Custom is dynamic and evolutionary. Given Africa’s predominantly illiterate environment, indigenous law was generally an unwritten law; it was an oral law. In many instances the chief or council of elders made oral proclamations for better conduct of community affairs, including announcement of prohibitions or the abolition of usages which the community had outgrown.

Early literature on the subject of law in pre-colonial and colonial Africa was written predominantly by non-jurists, particularly anthropologists and ethnographers, using the tool of their discipline to investigate the phenomenon of law in the continent.³ Such investigations, coupled with the fact that law in pre-colonial African societies appeared not to fit into Austin’s command theory of law, often led to a propagation of mutilated and confused

¹ Anyangwe, C *The Cameroonian Judicial System*, Publishing & Production Centre for Teaching and Research, Yaoundé, 1987.

² The subject of law as an integral part of society is discussed in textbooks on jurisprudence, for example, Lord Lloyd & Freeman MDA, *Lloyd’s Introduction to Jurisprudence*, 5th ed., Stevens & Sons, London, 1985; Dias RWM, *Jurisprudence*, 5th ed., Butterworths, London, 1985; Friedman W, *Law in a Changing Society*, 2nd ed., 3rd Indian Reprint, Universal Law Publishing, Delhi, 2003; Anyangwe C, *An Outline of the Study of Jurisprudence*, University of Zambia Press, Lusaka, 2005.

³ Hoebel EA, *The Law of Primitive Man*, Harvard University Press, 1964; Middleton & Tait, *Tribes without Rulers*, Routledge & Kegan Paul, London, 1958, Sawyer G, *Law in Society*, Oxford University Press, 1965, chapter 3.

exposition which fortunately was rectified and clarified with the tools of informed African jurisprudence.⁴

Section 1. Colonial period

§1. Legal system

In 1884 Germany proclaimed a protectorate over the River Wouri mudflat area in the armpit of Africa and named it *Schutzgebiet von Kamerun*. In 1887 the British settlement of Victoria and its hinterland under British jurisdiction since 1858 and located some one hundred miles west to the German protectorate, was transferred to Germany and it became part of the *Schutzgebiet von Kamerun*. The protectorate was administered according to German-introduced laws, including the Imperial German Criminal Code of 1871.⁵ But all of the introduced German law disappeared with the defeat of Germany in World War I, the consequential seizing of all its colonial territories and the imposition by the new colonial powers of their own laws.⁶ The legal framework for these measures was the Anglo-French partition of the *Schutzgebiet von Kamerun* under the Simon-Milne Agreement 1916. This partition, which gave birth to the British Cameroons and French Cameroun as distinct and separate polities, was confirmed by the Versailles Peace Treaties of 1919, the League of Nations' Mandates Agreement 1922, and the United Nations Trusteeship Agreement 1945.

The legal system in the Southern British Cameroons (the Southern Cameroons, for short) was the same as that of contiguous Nigeria with which the territory was administered. This was so because British Proclamations provided for the application in the British Cameroons of various ordinances in force in Nigeria. The law which was administered in the Southern Cameroons emanated from three sources, namely, customary law⁷, laws specifically

⁴ Elias TO, *The Nature of African Customary Law*, Manchester University Press, 1956; Allott AN, *New Essays in African Law*, Butterworths, London, 1970; Mensah-Brown AK, *Introduction to Law in Contemporary Africa*, Conch, New York, 1976.

⁵ In the view of commentators German justice was rough and characteristically questionable in form and content. Two examples are often cited, the pervasive use of corporal punishment and the application of group responsibility whereby a native community or its chief was held responsible for an alleged offence committed by an individual and who evades arrest. See, Rudin HR, *Germans in the Cameroons 1884-1914. A Case Study in Modern Imperialism*, Greenwood Press, New York, 1968 (originally published in 1938 by Yale University Press); Enonchong HNA, *Cameroon Constitutional Law*, CEPER, Yaoundé, 1967.

⁶ Britain, in what then became the British Cameroons; and France, in what then became French Cameroun.

⁷ Section 27(1) of the Southern Cameroons High Court Law 1955 enjoins the High Court to observe and enforce the observance of only those rules of customary law which pass the double test of repugnancy and incompatibility.

enacted for or extended to the territory, and English received laws. Law specifically enacted for or extended to the territory included various Proclamations and Orders-in-Council made for the Southern Cameroons, Nigerian Ordinances expressly extended to the Southern Cameroons, and British Imperial Acts of Parliament specifically made applicable to the Southern Cameroons either directly or through Nigeria. There was no comprehensive list of all the laws which were in force in the Southern Cameroons. But a large section of these laws existed in various colonial statute books known as the 'revised edition of the laws of the Federation of Nigeria'.

§2. The general law

The general law applicable in the Southern Cameroons is the English common law, the doctrines of equity and statutes of general application which were in force in England as of 1st January 1900. The general principles of the English law of crime, evidence and criminal procedure, for example are applicable in the territory in so far as they have not been expressly modified by legislation, judicial decision, or local laws, as happened when the Nigerian Criminal Code Cap 42, the Evidence Ordinance Cap 62, and the Criminal Procedure Ordinance Cap 43, were extended to the Southern Cameroons.

Most of the laws still applicable are of colonial origin and in some subject-matters current law in the parent state is directly applicable.⁸ The body of law applicable consists of local legislation, customary law⁹, and law derived from

⁸ Across the River Mungo, the enabling instruments for the introduction of French and French-derived laws in what, on 1st January 1960, became the Republic of Cameroun were the Decrees of 16th April and of 22 May, 1924. Both decrees were made pursuant to the provisions of the French mandate for French Cameroon, 20 July 1922. They extended to the territory all statutes and decrees promulgated in French Equatorial Africa before the 1st January 1924 provided that any such law is not contrary to legislation specifically made for Cameroun and to the French mandate for the territory. The content of the received French law in Republic of Cameroun consists of (i) all French laws in force in Senegal as of 17 March 1903, (ii) all statutes and decrees promulgated in French Equatorial Africa before 1924, (iii) all statutes, decrees, orders and regulations passed by the French Government after 1 January 1924 and promulgated in French Cameroun by the local French Commissioner, and (iv) any statute, decree and regulation in force in France and directly extended to French Cameroun by decree of the French Head of State. The Mandates and Trusteeship Agreements for French Cameroun conferred on the French Parliament full powers to enact laws for Cameroun on any subject. However, laws passed in France had to be specifically promulgated in the territory to be valid. France legislated for the whole of French Equatorial Africa, of which Cameroun was a part, and it was left to the local French Commissioner in Cameroun to promulgate the same law specifically in Cameroun by means of proclamations.

⁹ Customary law was administered by customary courts which also had limited criminal jurisdiction by virtue of section 14 (1) of the Customary Courts (Southern Cameroons) Law 1956 which provided as follows: "Every customary court shall have full jurisdiction and power

the parent state. The enabling statute for the introduction and observance of English law in the Trust Territory of the Southern Cameroons under British Administration was the English Foreign Jurisdiction Acts 1843-1890. The Mandates and the Trusteeship Agreements vested in Britain full powers of administration and legislation in the Southern Cameroons and gave Britain the liberty to apply English laws in the territory subject to modifications required by local conditions. In 1923 Britain enacted the Cameroons under British Administration Order-in-Council No. 1621 of June 1923 providing for the territory to be administered as though it formed part of the Protectorate of Nigeria. The 1924 British Cameroons Administration Ordinance (amended in 1925, 1927, 1928, and 1929) provided that the Southern Cameroons was to be administered as though it formed part of Southern Nigeria.

English laws and English-influenced Nigerian legislation were therefore formally extended to the Southern Cameroons. Thus it is that Nigeria and the Southern Cameroons came to have the same courts system and laws. Section 14 of the Nigerian Supreme Court Ordinance 1914 directed the Supreme Court to apply the common law, the doctrines of equity and statutes of general application which were in force in England on 1st January 1900. Section 11 of the Southern Cameroons High Court Law 1955 re-enacted section 1 of the Nigerian Supreme Court Ordinance while section 15 of the same Law provided for the timeless reception of English law in matters of probate, divorce and matrimonial causes. Sections 11 and 15 of the Southern Cameroons High Court Law thus define the content of English law application in the Southern Cameroons. Section 11 provides:

“Subject to the provisions of any written law and in particular of this section and of sections 10, 15 and 22 of this law –

- (a) The common law;
- (b) The doctrines of equity; and
- (c) The statutes of general application which were in force in England on the 1st day of January 1900, shall in so far as the legislature of the Southern Cameroons is for the time being competent to make laws, be enforced within the jurisdiction of the court.”

Section 15 provides:

to the extent set forth in the warrant establishing it and subject to the provisions of this law, in all civil and criminal cases in which all the parties belong to a class of persons who have ordinarily been subject to the jurisdiction of the customary tribunals.”

“The jurisdiction of the High Court in probate, divorce and matrimonial causes and proceedings may, subject to the provisions of this law and in particular of section 27, and to rules of court, be exercised by the court in conformity with the law and practice for the time being in force in England.”

Section 10 empowers the courts, so far as practice and procedure are concerned, to follow the practice and procedure of the English High Court of Justice in the absence of local legislation.¹⁰ Section 10 enacts:

“The jurisdiction vested in the High Court shall, so far as practice and procedure are concerned, be exercised in the manner provided by this Law or any other written law, or by such rules and orders of court as may be made pursuant to this Law or any other written law, and in the absence thereof in substantial conformity with the practice and procedure for the time being of Her Majesty’s High Court of Justice in England.”

Received laws continue to apply until repealed altogether or to the extent to which it is inconsistent or incompatible with the constitution or any other domestic legislation. The received law is thus kept alive, to fill gaps in domestic law. Successive constitutions always take care to provide that all existing laws shall remain in force until expressly or impliedly repealed by local legislation. The practical effect of this is the preservation of a substantial body of law received from the parent state.¹¹

§3. Punishment

Terms of imprisonment in the Southern Cameroons were generally never high.¹² There were seldom sentences of imprisonment of more than five years.

¹⁰ English practice and procedure timelessly apply to supplement any gaps, until such gaps are filled by local legislation.

¹¹ Section 53 (1) of the 1961 Constitution of West Cameroon (i.e. the Southern Cameroons) provided that “Subject to the provisions of this section, the existing laws shall have effect after the commencement of this Constitution, as if they had been made in pursuance of this Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.”

¹² This may be contrasted with what obtained across the River Mungo in French Cameroun. There, in pursuit of its self-appointed ‘*mission civilisatrice*’ in her colonial territories France adopted two basic policies, namely, assimilation and direct rule as well as forced labour, to achieve what was touted as the ‘advancement of natives’. One feature of French colonial penal system was that offences tended to be ill-defined (especially offences under the *indigénat* decree) and there was a marked preference for use of the jail sentence, the fine being seldom used. Further, sentences were generally harsh and long, often up to ten years. The

But it was common practice to sentence prisoners to a term of imprisonment 'with hard labour'. Fines too were not excessive. Up to 1960 an offender in the Southern Cameroons was still liable to corporal punishment as a penalty for crime. Flogging was carried out with a 'light cane' in enclosed premises after medical examination. Twelve strokes on the bare buttocks was the maximum permissible corporal punishment.

However, from 1958 onwards persons who under 16 years of age could be subjected to corporal punishment for purposes of correction only. Schedule III (B) of the Penal Code saves a number of provisions of the Criminal Code Ordinance Cap 42. Among the saved provisions is section 295 which provides:

"A blow or force, not in any case extending to a wound or grievous harm, may be justified for the purpose of correction as follows:

(1) A father or mother may correct his or her legitimate or illegitimate child, being under sixteen years of age, or any guardian or person acting as guardian, his ward being under sixteen years of age, for conduct or disobedience to any lawful command;

(2) A master may correct his servant or apprentice, being under sixteen years of age, for misconduct or default in his duty as such servant or apprentice;

(3) ...;

(4) A father or mother or guardian, or a person acting as a guardian, may delegate to any person whom he or she entrusts permanently or temporarily with the governance or custody of his or her child all his or her own authority for correction, including the power to determine in what cases correction ought to be inflicted; and such a delegation shall be presumed, except in so far as may be expressly withheld, in the case of a schoolmaster or a person acting as a school master in respect of a child or ward;

(5) A person who is authorised to inflict correction as in this section mentioned may, in any particular case, delegate to any fit person the infliction of such correction; and

convicted person could be deported from the territory or could be banished from his locality or sent into exile for up to ten years. Women and dangerous prisoners stayed indoors. Other prisoners worked outside in *chantiers administratifs* doing their daily *corvée*. Prison labour (hardly distinguishable from slave labour) was available for hire by anyone who needed such labour and could afford to pay for it. Prisoners could be moved round from one prison to another within the territory 'dans l'intérêt d'un bon fonctionnement du régime pénitentiaire et en vue d'une utilisation judicieuse de la main-d'œuvre pénale'. The penal system distinguished between *détenus de droit commun* and *détenus administratifs*, the latter being in effect political prisoners.

(6) No correction can be justified which is unreasonable in kind or in degree, regard being had to the age and physical and mental condition of the person on whom it is inflicted; and no correction can be justified in the case of a person who, by reason of tender years or otherwise, is incapable of understanding the purpose for which it is inflicted.”

Thus, corporal chastisement is still permissible in the Southern Cameroons but only as a form of correction, not punishment, and in respect of only persons who are under sixteen years of age; and provided the chastisement is reasonable in kind and in degree. The section is couched as a defence rather than as a permissive law on corporal chastisement. The only justification for the infliction of corporal punishment as a form of correction is the old adage which says “spare the rod and spoil the child” and the Biblical counsel to correct children when they misbehave¹³. Over the years, however, corporal chastisement has practically died away. From time to time reports are heard of some parents who, depending on the circumstances, inflict corporal punishment of one kind or another on a delinquent child. But this is increasingly rare. In schools corporal punishment is completely out of date. No one hears of school teachers flogging their delinquent or lazy pupils. Be that as it may, corporal chastisement as a form of punishment or as a penalty for crime no longer exists. The surviving vestige of corporal chastisement is in its theoretical and very limited variant as a form of correction for delinquent under-16 children.

A court in the Southern Cameroons could recommend to the Governor-General of Nigeria that a person be deported from one part of the territory to another. The recommendation was made if the person had been convicted of an offence punishable by imprisonment without the option of a fine and it seemed that deportation would be in the interest of peace, order and good government. Similar considerations applied where a person was likely to commit or provoke a breach of the peace and failed to give security for good behaviour. The same applied to people who sought to incite enmity against the Crown and to anyone who intrigued against constituted power and authority. Further, if the Governor considered that a former chief, village headman, member of a Native Authority, or member of a Native Court, ought in the

¹³ The Book of Proverbs records the following wise words of Solomon, son of David, King of Israel: “If you do not punish your children, you don’t love them, but if you love your children, you will correct them.” (Proverbs 13: 24). “Don’t fail to punish children. If you spank them, they won’t die. If you spank them you will save them from death.” (Proverbs 23: 13-14). “Correction and punishment make children wise, but those left alone will disgrace their mother.” (Proverbs 29: 15). “Correct your children, and you will be proud; they will give you satisfaction.” (Proverbs 29: 17).

interest of the maintenance of or the re-establishment of public order to leave the community where he used to exercise authority, the Governor could cause him to be removed to such other part of the territory as was directed. This was a powerful weapon in the hands of the colonial authority to deal with troublemakers, nonconformists and political activists. This provision was however never used in the Southern Cameroons. Likewise the Governor's power to reprieve condemned persons in appropriate cases does not seem to have been used in the territory.

§4. Prisons

Prisoners worked mainly outside the prison – cutting grass, carrying firewood and water, farming, building and so on. Indoors, prisoners learnt handicrafts – how to carve, make mats, ropes, baskets, stools and so on. They also learnt carpentry and how to sew. With the establishment of the Buea Dairy Farms in 1957, selected prisoners were housed and employed there under 'open prisons conditions' where they got a constructive agricultural training in cattle grazing, milking of cows, pig farming, and the growing of vegetables such as tomatoes, carrots and cabbage. Prisoners put in 6 ½ hours of work per day. Female prisoners were supervised by wardresses and were chiefly employed in the preparation of meals. Those serving long sentences were taught sewing and handicrafts. Educated prisoners were encouraged to teach illiterate ones. Adult education classes were held inside the prisons.

Section 2. Post-colonial period

§1. Body of law in force

The body of law in the Southern Cameroons consists of customary law, English and English-derived laws, and local legislation. Local legislation comprises laws made by (i) the Nigerian legislature between 1916 and 1960 and extended to the Southern Cameroons, (ii) legislation by the Southern Cameroons House of Assembly from 1954 to 1961, (iii) legislation by the West Cameroon House of Assembly from October 1961 to 1972, (iv) legislation by the Federal House of Assembly and executive instruments from 1962 to 1972, and (v) legislation by Yaoundé including executive instruments since 1972.

There is no comprehensive compilation of all the laws applicable in the Southern Cameroons. But most of the laws can be found in the collection known as *Laws of the Federation of Nigeria and Lagos*, 1958 edition by Sir Donald Kingdon, the *Laws of the Southern Cameroons 1954 – 1956* by Justice F.O.C. Harris, and the *Répertoire Chronologique du Droit Camerounais* which is a yearly compilation by Yaoundé of some laws applicable in Republic of Cameroun

and in the Southern Cameroons. There is also an *Index to Laws and Legal Notices of West Cameroon from 1 October 1954 to 31st March 1965*.

§2. Codification of the criminal law

A code is a species of legislation which attempts to sum up existing law on a particular topic. It aims to provide a complete answer to any legal problem within its conceptual framework. Strictly speaking therefore, it crystallises the law and precludes citing of any case-law or statute on any topic dealt with by the code. In reality, however, the word ‘code’ is not a term of art and there is no compelling reason why a code may not allow reference to relevant previous decided cases in order to make its provisions meaningful.

The chief merit of codification is that it produces a systematic, compact and accessible law in place of an unwieldy law. It makes the law more accessible to the public, even if not necessarily completely intelligible to them. Case-law, like sporadic and hasty legislation, produces gaps, uncertainties and irrational distinctions which a code removes. But codification is not free from shortcomings. First, codification is necessarily incomplete and cannot possibly provide for all future cases. A code states only the broad principles, and what it gains by way of economy of wording it loses in detail. In the result numberless decisions will mushroom forth to fill in the outlines, which will then lead to a system of case-law. Secondly, a code is less malleable and may not be all that easy to alter, especially if the code is not a small document. Thirdly, a code in order to approach completeness would have to consist of rules so minute and numerous that no man can learn or retain them.

The efficient working of a code should not be impeded by a wrong approach to its administration. The fact that a code is said to crystallise the law on a particular subject is the more reason why courts ought to interpret it by adopting the purposive approach and supplying a *casus omissus* (a matter which should have been, but has not been, provided for in a statute) whenever there is a gap. The code should not prevent a body of case-law growing up around it. In America and India, for example, the existence of codes has not diminished the importance of case-law. The makers of a code cannot foresee all possible contingencies. Human prescience is limited. Therefore, after a code is promulgated, cases are bound to arise for which no provision has been made. A customary remedy for such a situation is the introduction of legislation to amend the code. But there is no persuasive reason why there should also not be judicial law-making in this area, the more so as it usually takes time for any desired amendment to be effected.

Ideas on what form a code should take are not lacking. But there is no doubt that small codes are better. In terms of style, when one turns to India,

for example, one finds that Indian codes incorporate hypothetical factual examples so that the code is at once a statute and a collection of decided cases. Also, a code may be more elaborate. It should consist not only of rules but also of examples of the application of the rules and the reasons for the rules. This is more or less the form which the American (proposed new) Federal Criminal Code and the Cameroon Penal Code have adopted. Each section of the code setting forth rules is followed by an official explanatory note which though denuded of legal force nevertheless serves as a useful guide to anyone using the code.

As early as 1964, two ad hoc law reform commissions were created – one on Penal Legislation and the other on Civil and Customary Legislation. The latter died stillbirth. It is in the area of criminal law and procedure that harmonisation and codification have taken place since this part of the law touches on the liberty of the individual. The criminal law and procedure applicable in the Southern Cameroons was already codified and so too in Republic of Cameroun. In the Southern Cameroons the Nigerian Criminal Code Ordinance, Cap 42 of the 1958 laws and the Criminal Procedure Ordinance, Cap 43 of the 1958 laws were fully applicable as a result of British administration of the Trust Territory of the Southern Cameroons as part of Nigeria. Section 2(1) of Cap 42 provided:

“The provisions contained in the code of criminal law set forth in the schedule to this Ordinance and hereinafter called the ‘Code’ shall, except to the extent specified in subsection (2), be the law of each Region, of Lagos and of the Southern Cameroons with respect to the several matters herein dealt with and shall apply as though Lagos and the Southern Cameroons were each a region.”

The French *Code Pénal* and *Code d’Instruction Criminelle*, tinkered with to suit local conditions, were applicable in French Cameroun which achieved independence as Republic of Cameroun. The provisions of these two sets of codes were of course not the same. For example, the criminal procedure in Republic of Cameroun is, in essence, inquisitorial in nature, whereas in the Southern Cameroons it is accusatorial coupled with concepts of protection against self-incrimination.

The ad hoc Commission for Penal Legislation was made up of 21 members – a mixed bag of judicial and legal officers most of them Frenchmen, civil servants, advocates, and law lecturers. The Commission was directed to prepare two separate documents – a penal code and a criminal procedure code. Since the Commission was not a standing commission it met sparingly.

In two years it met only five times and each meeting session lasted barely three to five days. Much of the work of the Commission fell upon a small full-time working group of three members, two Frenchmen (Richard Gilg and Robert Parant) and one Englishman (Clarence Smith). The working group benefited from the invaluable assistance of the Chief Justice and the Attorney General for the Southern Cameroons, respectively Gordon CJ and PLU Cross.¹⁴

The actual drafting of the Penal Code was thus done by the small working group of three foreign judicial and legal officers. This three-man committee drew from the Italian Penal Code of 1931, the ill-fated French Penal Code including the draft Penal Code of 1934, and the Nigerian Criminal Code (based on the 1879 draft code of James Fitzjames Stephen for use in England, which, though not adopted by that country, was passed into law with variations in a number of Commonwealth countries including Australia (Queensland) and Canada).

“The interest of the new Penal Code ... lies not only in its application indifferently to the ex-French and ex-British [Cameroon] ..., but even more in its derivation from both systems of law so far in force there, namely, English law via the Nigerian Criminal Code ... and the French Penal Code which in its original form is due to Napoleon. The new Code is not only bilingual ... but ‘bi-jural’. The Code took a little over two years to draft and consists in all of 363 sections. This makes it one of the shortest Penal Code – if not the shortest in the world, and its brevity is not due to lack of content. In fact it contains all the material included in both its parents, with the exception of a few provisions of a purely procedural nature which have been left un-repealed, and in addition incorporates all existing special laws on the subject. The conciseness, together with the Code’s unity of conception was due to the drafting being restricted to a sub-committee of three, of whom only two were called upon to devote to it their unremitting labour. The French representative was Richard Gilg, a senior legal officer specially seconded from the Paris Ministry of Justice ... and his opposite number was this writer [Clarence Smith] an English lawyer ... The Chairman of the Criminal Law Commission, and also of our sub-committee, was Robert Parant, even higher in the Paris Ministry of Justice, and seconded to [ex-French] Cameroun as Procureur General to the Supreme Court ... For inspiration we did not confine ourselves to the statutory material on either side. In particular we made considerable use of the Italian Penal Code of 1931, and more of the ill-fated French draft of

¹⁴ Parant R, Gilg R and Clarence Smith JA, ‘*Le Code Pénal Camerounais – Code Africain et Franco-Anglais*,’ *Revue Science Criminelle et Droit Pénal Comparé*, p. 339.

1934 which it largely inspired ... The English Law Revision Committee's recommendations were unfortunately too late to be of any assistance. It was also necessary, in order to present a complete picture, to resort to case-law on both sides."¹⁵

The Penal Code took a little over two years to draft and it was promulgated in stages. Book I (the General Part) was passed into law on 12 November 1965 and came into force on 1 October 1966. Book II (the special Part dealing with specific offences) became law on 12 June 1967 and was rendered enforceable on 1 October 1967.

Initial work on the Criminal Procedure Code was carried out by a Commission made up entirely of locals. The Commission worked on a proposed draft criminal procedure code prepared by the Ministry of Justice. That proposed draft was itself based on a preliminary rough draft outline that had been made by the three-man Penal Code drafting sub-committee. The Criminal Procedure Code Commission debated and decided on what should go into the procedure code and made a rough draft of it. The technical drafting of the whole Criminal Procedure Code was entrusted to a small Technical Drafting Committee of seven members, of which this writer was one. Our task in the Technical Drafting Committee headed by Mr Remy Mbaya of the Supreme Court, was to go through the draft prepared by the Commission. We were to ensure that the document promoted and safeguarded the desiderata of a fair trial. We were also to ensure that the document, benchmarked against modern criminal procedure codes, contained all the relevant provisions that ought to go into such a code. We went through the document article by article to make sure that the ideas therein expressed are in proper language and legal phraseology and that the entire document is organised in a clear, simple, systematic, logical and coherent manner. We had a free hand to deal with any muddled thinking or errors in conceptualisation.

But the technical drafting committee soon got mired in bigotry and cultural prejudice. What bugged down the finalisation of the draft and delayed its adoption was the fact that French-speaking members of the Committee, the majority on the Committee, saw or were mandated to consider this exercise as one more strategy for imposing the rules of the French legal system, irrespective of the merit of those rules. Arguments often tendered to be acrimonious and sentimental and the whole drafting exercise degenerated into a matter of a count of heads. The document could not be finalised and had to be put in abeyance. It was resurrected by the Ministry of Justice more than two

¹⁵ Clarence Smith JA, 'The Cameroon Penal Code: Practical Comparative Law,' 17 *International and Comparative Law Quarterly* 651 (1968).

decades later when it was believed, rightly or wrongly, that resistance by lawyers of Common Law background to the adoption of an overwhelmingly French-law elements of criminal procedure would somehow have been removed. Another committee within the Ministry, apparently pliant, ‘finalised’ the document in 2008 and it was promulgated into law the same year.

The Principle of Legality: A Safeguard of Individual Liberty

The principle of legality is the root principle that underlies the administration of the criminal law in all modern systems of law. It forms part of the rule of law originally adumbrated by European political thinkers of the 17th and 18th centuries like Montesquieu and Beccaria who were very dissatisfied with the harshness and arbitrariness of both the political and criminal justice systems of the time. This fundamental principle is often expressed in the following Latin maxim, *nullum crimen, nulla poena sine lege*. There is no crime, no punishment, except in accordance with law. There can be no crime or penalty without law making it so. The maxim embodies the principle that conduct cannot be punished as criminal unless some law has been passed declaring such conduct to be criminal and punishable as such. The principle accordingly denies the validity of retrospective declaration of criminality of any kind of conduct. It also denies the justifiability of a court declaring to be criminal, when a case arises, anything not previously declared criminal.

Section 17 of the Penal Code formulates the same principle slightly differently in these terms:

“No penalty or measure may be imposed unless provided by law and except in respect of an offence lawfully defined.”

The principle consists of two elements: *nullum crimen sine lege* – no crime except in accordance with the law; *nulla poena sine lege* – no punishment except in accordance with the law. There is no crime if no law says so, and there is no punishment except in accordance with the law. Pithily put, there is no offence and no punishment except within the confines defined by law.

The principle calls attention firstly to the fact that a crime exists only when so decreed by law, and secondly to the necessity of punishment being in accordance with the law. Both the crime and its attendant punishment must be predetermined law. It must not be a subsequent or retrospective law, because the principle of non-retrospection forbids *ex post facto* legislation (i.e., legislation after the act).

The focus of section 17 is on ‘penalty or measure’. The court may impose a penalty or measure only when two conditions are met. First, the penalty or measure must be provided by law. Secondly, the penalty or measure must

relate to an offence lawfully defined. The phrase ‘an offence lawfully defined’ does not mean there is a lawful mode or way of defining offences. It means the offence must have been created by the authority constitutionally empowered to create it. That authority is primarily the legislature and to a limited extent the executive branch of government. There is nothing like judge-made law in this country. No court may impose a penalty laid down, or try for an offence created, by an authority that has no constitutional power to do so. Such a trial would, on appeal, be declared null and void and the penalty ineffectual. Since the courts in this country have no power to invalidate legislation on the ground of unconstitutionality, an offence though ‘unlawfully defined’ will, illegitimately, nevertheless continue to exist in the statute books until repealed.

In view of the principle of non-retrospection declared in section 3 of the Penal Code it is clear that an ‘offence lawfully defined’ must have been created before, not after, the act or omission by the accused. Clearly the principle of legality seeks to remove the danger of government (executive, legislative and judicial) arbitrariness and capriciousness. The principle also seeks, by necessary implication, to safeguard and to promote the liberty of the individual.

A discussion of the principle of legality also invites an examination of two related subjects, namely, sources and interpretation of rules of criminal law, and classification in criminal law.

Section 1. Source, scope and rationale of the principle

§1. Source

The principle of legality was first adumbrated by early criminologists of the eighteenth and nineteenth centuries, especially the Italian thinker Cesare Beccaria. The French revolutionaries, reacting against the absolutism and arbitrariness of the French monarchy, made a meal of it. They wrote what turned out to be the first important formulation of the principle. Article 8 of the historical human rights document which the revolutionaries proclaimed in 1789 as the Declaration of the Rights of Man and the Citizen states:

“No one shall be punished except by virtue of a law made and published prior to the offence and lawfully enforced.”⁵

⁵ “*Nul ne peut être puni qu’en vertu d’une loi établie et promulguée antérieurement au délit et légalement appliquée*”. This principle was also enshrined in the French constitution of 1791.

The principle of legality has since then been regarded by most thinkers as a self-evident principle of justice. It has become a democratic platitude adopted by most countries and is even articulated as a fundamental human right.

The *American Constitution* expresses the principle by way of forbidding *ex post facto* legislation and prohibiting deprivation of life, liberty and property without due process of law.⁶ In England, the proclamation in *Magna Carta* 1225 that “no one shall suffer criminal action to be taken except in accordance with the law of the land” was arguably an embryonic statement of the principle of legality. Notwithstanding the controversial decision in *Shaw v. DPP*⁷, it is a well-established rule in English law that there is no crime and no punishment except in accordance with the law. In *R. v. Price*⁸ Stephen J. declared that “the great leading rule of criminal law is that nothing is a crime unless it is plainly forbidden by law.”

The principle of legality is repeated, in slightly different formulations, in key international and regional human rights instruments as well as in national constitutions and criminal statutes, as part of the presumption of innocence

⁶ Article 1, section 9(3): “No Bill of Attainder or *ex post facto* law shall be passed.” The Fifth Amendment provides that no person shall “be deprived of life, liberty, or property, without due process of law.”

⁷ [1962] AC 220. Shaw published a booklet, *The Ladies Directory*, in which prostitutes advertised their names, addresses and services. He was charged with conspiracy to corrupt public morals and was convicted. His appeal was dismissed by the Court of Criminal Appeal and he made a further appeal to the House of Lords and again lost. The House held that the courts retain a residual power to enforce the fundamental purpose of the law and that there is indeed such an offence known to the law as conspiracy to corrupt public morals. Viscount Simonds declared, “In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for. ... When Lord Mansfield ... said that the Court of King’s Bench was the *custos morum* of the people and had the superintendency of offences *contra bonos mores*, he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain, since no one can foresee every way in which the wickedness of man may disrupt the order of society. ... [I]t is for Her Majesty’s judges to play the part which Lord Mansfield pointed out to them.”

⁸ (1884) 12 QBD 247. In *R.v. Price*, the defendant was indicted on a charge of having prevented the holding of an inquest on the body of his child and of having attempted to burn the body instead of burying it. After full consideration of the case Stephen J. declared, “I have been unable to discover any authority for the proposition that it is a misdemeanour to burn a dead body, and in the absence of such authority I feel that I have no right to declare it to be one. ... Though I think that to burn a dead body decently and inoffensively is not criminal, it is obvious that if it is done in such a manner as to be offensive to others it is a nuisance of an aggravated kind.”

and fair trial guarantees. The Universal Declaration of Human Rights (1948) provides in Article 11 (2):

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

The International Covenant on Civil and Political Rights (1966) provides in Article 15:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the offence was committed. If, subsequent to the commission of an offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

This provision is a textual repetition of the provision of Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) save that whereas the ICCPR speaks of “the general principles of law recognized by the *community of nations*” the European Convention talks of “the general principles of law recognized by *civilized nations*”.

The American Convention on Human Rights (1969) guarantees in Article 9 freedom from *ex post facto* laws:

“No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed. If subsequent to the commission of the offence the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.”

Article 7 (2) of the African Charter on Human and Peoples' Rights (1981) provides:

“No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.”

The principle of legality, the principle that no one shall be judged or punished except by virtue of a law promulgated and published before the offence was committed, is thus a well-established principle in human rights law as well as in criminal law.

The Penal Code, for example, declares in its Article 17 that: “No penalty or measure may be imposed unless provided by law, and except in respect of an offence lawfully defined.” It is clear from this provision that a penalty or measure prescribed by law must be in respect of an offence lawfully defined. But must an offence lawfully defined always be accompanied by a penalty or measure attaching to it? In other words, would the principle of legality be breached if a law creates an offence but prescribes no penalty or measure for it? This was the issue before the court in the unreported South African case of *Director of Public Prosecutions for the Western Cape v Arnold Prins*⁹.

In that case the Western Cape High Court had to consider the principle of legality with respect to some of the offences created in the Sexual Offences Amendment Act 2007. The Act specified the elements of the offences it created. But, whether by design or neglect, it did not prescribe the penalties for those offences. Did the failure of the lawmaker to attach a penalty clause to the offences it created violate the principle of legality? The High Court held that these ‘offences’ were in fact not offences at all, because without the necessary prescribed penalties, the *nulla poena sine lege* aspect of the principle of legality is violated. Dissatisfied with this ruling, the DPP took the ruling on appeal to the Supreme Court of Appeal. The appellate court considered the effect of the absence of a penalty clause in the offences created by the Sexual Offences Amendment Act 2007. In doing so, it analysed the Act as a whole, contextually. The Court noted that the language of the relevant sections of the impugned Act is unequivocal. It went on to reason that “the context provided by the need to protect vulnerable people against sexual attacks in the light of the Constitution and South Africa’s international obligations reinforces the

⁹ (A134/08) [2012] ZAWCHC 42 (11 May 2012).

construction that each of the relevant sections creates an offence.” It then concluded that the absence of specific penalties for some of the offences created in the Sexual Offences Amendment Act 2007 did not violate the principle of legality, including the *nulla poena sine lege* aspect of the principle.¹⁰ Kemp et al., however, caution against reliance on this decision, given its narrowly circumscribed context.

“The Supreme Court of Appeal’s application of the legality principle in *DPP v Prins*, is, all aspects considered, probably correct as far as the provisions of the [Act in question] are concerned. However, in terms of general criminal law theory, it is prudent to warn against using [a provision] of the Criminal Procedure Act ... to fill the gaps where legislation, for whatever reason, is silent on specific penalties for crimes created. The legality principle, in our view, demands – in principle – adherence to both aspects: *nullum crimen sine lege* and *nulla poena sine lege*.”¹¹

§2. Scope and rationale

The principle of legality has two aspects. The first aspect is the legality of criminal offences. This limb of the principle forbids the prosecutor from indicting, and the judge from trying, anyone for any conduct which was not beforehand decreed as a punishable offence. The second aspect of the principle is the legality of punishment. This limb of the principle forbids the judge from imposing any punishment not provided by law. The principle of legality in effect ordains that an accused person should stand trial only if his conduct amounts to what a law, existing prior to the impugned conduct, declares to be and defines as an offence; and that if an accused is found guilty the judge must impose only such punishment as provided under a law in existence prior to the commission of the offence.

The principle is founded on considerations of justice and public policy. A proper and just criminal law policy requires that the law, as a matter of fairness and deterrence, forewarns before striking. When the law gives prior warning the citizen is then put in a position to know in advance, as he goes through life, what conduct society allows and what it prohibits. The citizen is then able to ascertain beforehand how he stands with regard to the criminal law. He makes an informed choice and takes full responsibility for the consequences of his action. If the law does not give prior warning, any punishment inflicted will

¹⁰ *DPP, Western Cape v Prins (Minister of Justice and Constitutional Development and two amici curiae intervening)* (369/12) [2012] ZASCA 106 (15 June 2012), unreported.

¹¹ Kemp et al., p.19.

take on the appearance of purposeless cruelty. Punishment in whatever form it takes entails a loss of rights or advantages consequent on a breach of law. When punishment loses this quality it degenerates into an arbitrary act of violence that can produce nothing but bad social effects.

A key advantage of the principle of legality is that it is a guarantee of individual liberty, for its effect is that it protects the individual against the arbitrariness both of the lawmaker and of the judge. In fact, there would be neither peace nor liberty if persons could be punished for acts whose criminal character they had no fore-knowledge of. One reason why people generally obey the law is because of the presumed general, impersonal and forward-looking character of the law. By insisting that offences and punishments be provided beforehand by law the principle of legality in effect seeks to obviate the danger of legislative and judicial arbitrariness, and also to promote social order.

The principle of legality serves educational and deterrent ends as well. The criminal law as a code of social values fulfils an educational function. It spells out impermissible conduct and the punishment attaching to such conduct in the event of breach. Threat of punishment inhibits criminal activity by acting as a negative inducement that discourages criminal behaviour, thus serving as general deterrence.¹² Threat of punishment, through socialisation and education, marks off that which is right from that which is wrong. It bespeaks a social and moral condemnation of conduct that is reprehensible and a corresponding support for the values captured by the prohibition of the conduct in question.

The principle of legality ordains that both crime and punishment be stipulated by law. The principle thus binds the lawmaker and also the judge in that it frowns on judicial criminal legislation. Constitutionally, and consistent with the classical doctrine of separation of powers, parliament is vested with legislative powers. Parliament enjoys monopoly in law-making. It enjoys legislative supremacy and is at liberty to delegate some of its law-making powers to the executive branch of government. *Prima facie* therefore, parliament has primary responsibility for legislation in respect of all offences and of punishments.

¹² One should perhaps not over flog the deterrent effect of the criminal law. The threat of punishment appears to have almost no effect on mentally abnormal and defective persons; is less easily verifiable with regard to people emphatically committed to a life of crime (professional criminals); and probably has real effect only on marginal offenders (i.e. those who are neither committed to a life of crime nor to a law-abiding life).

However, realism and practical necessity have impelled parliament to delegate some of its law-making powers, even in the area of criminal law, to the executive branch of government which then does so by way of subordinate legislation denoted as statutory instruments. In some jurisdictions the executive may create offences by instruments variously styled ordinance, decree, proclamation, order, or bye-law. But more often than not parliament in liberal democracies retains its monopoly over the creation of the more serious offences (felonies and misdemeanours) and delegates to the executive power the creation of regulatory offences only.

However, a noticeable development in this matter, especially in third world countries, is the increasing abdication by parliament of its constitutional responsibility in the area of legislation in respect of offences. Regulation-issuing power has become the monopoly of the executive. The power to create even the most serious crimes is often delegated to the executive. This development is hardly surprising as virtually all legislation especially in developing countries and in authoritarian regimes emanate from the executive branch of government, parliament being reduced to the role of a clapping chamber and a rubber stamp of executive decisions.

Regarding the courts, constitutionally the judge has no legislative powers and so can neither create offences and penalties nor try for any offence and inflict any punishment not provided by law. Any judge purporting to act in this wise would be guilty of usurping a legislative function and thereby violating both the principle of legality and the doctrine of separation of powers. Long ago in England, Lord Bacon advised judges not to invade the province of the legislature. He cautioned them that they ought to remember that their office is “*ius dicere*, and not *ius dare*; to interpret law, not to make law or give law.” In reality, however, practice in that country does not accord with this Baconian precept. The courts there have added to the number of offences in that country – what is there known as offences under the common law.

The principle of legality has implications for criminal lawmaking, criminal law application, and criminal law policy.

Section 2. Implications of the principle

§1. For criminal law legislation

If the principle of legality is to be meaningful criminal laws must be adequately enacted. This means criminal offences must be well defined and written in language that is easily understood. The text of the criminal law must be made easily accessible and affordable. The reason for this desideratum is

that the lawmaker must, as a matter of fairness, give fair warning, in easily understandable language, of what the law intends to do if a certain line, clearly and well-defined, is crossed. In that way the citizen is adequately put on notice. The maxim that 'ignorance of the law does not excuse' (*ignorantia juris non excusat*) is premised on the clarity, intelligibility and accessibility of the law. For, the maxim applies only in regard to ignorance of the law which everybody is supposed to know. If a man has no means of knowing a particular law, if he has no means of informing himself about it then it would be oppressive to hold him accountable under that law.

The requirements of clarity, intelligibility and accessibility would not have been fulfilled if offences are ill-defined or drawn in such general terms as would render almost anybody liable, and if the criminal law is poorly drafted and embedded in volumes of statutes scattered all over the place. The substantive criminal law is not like procedural law which is meant for lawyers only. Criminal law, being prohibitions that are breached under pain of punishment, is addressed to all classes of society. The public is entitled to know not just what conduct is criminal but also the punishment that legally attaches to each crime. The document containing the criminal law must be handy, available, and affordable by members of the general public. This need is not relieved by the fact that many crimes merely put into legal form the ordinary rules of morality (i.e. *crimes mala in se*). There are many crimes, even on the increase in the contemporary world, which are not an expression of popular morality.

It follows that conduct that is criminal must be properly defined and the penalty attaching thereto clearly indicated. Certainty in drafting is a very important ingredient of legality. The principle of legality is an injunction to the lawmaker not to draw its statutes in such broad general terms that almost anybody can be brought within them at the whim of the prosecuting authority and the judge. In the USA, given that the US Constitution is the supreme law of the land, statutes offending against the principle of legality may be held unconstitutional and void. In England, on account of the doctrine of parliamentary sovereignty in that country, the courts will not hold a statute offending against the principle of legality void but will interpret it strictly.

It is argued by some that the principle of legality would make sense only if every prospective criminal were a lawyer. The ordinary man, it is pointed out, does not know precisely what conduct is punishable by the criminal law and what is not. This is particularly so in those countries in which a large part of the population is still illiterate. Even the ordinary educated man does not consult a lawyer in advance of the crime to discover its precise limits.

§2. For criminal law policy

A major corollary to the principle of legality is another principle, the principle of non retrospection of criminal laws. The former principle would be of much reduced significance, if it were not to be accompanied by the latter principle. In terms of the principle of non-retrospection the law should not be made to punish acts that were perpetrated before its coming into force. This general prohibition of retrospective criminal laws is a critical deduction from the principle of legality and will be explored in depth in the next chapter.

Another important deduction from the principle of legality is the prohibition of any analogical extension of criminal laws. Controversially, however, Article 7 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 15 (2) of the International Covenant in Civil and Political Rights (ICCPR) provide that notwithstanding the principle of legality it is permissible to try and punish any person “for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” In the circumstance contemplated by the provision the punishment need not have been foreordained. This qualification on the principle of legality reminds one of a similar departure from it made by Nazi Germany in the Act of June 28, 1935, which provided:

“Whoever commits an act which the law declares to be punishable or which is deserving of punishment according to the fundamental idea of a penal law and sound popular feeling, shall be punished. If there is no penal law applying directly to the act it shall be punishable under the law whose basic idea best fits it.”

The then Soviet Union also adopted the principle of analogy. But, while the Nazi law was little applied and was later repealed, the Soviet Union applied the principle of analogy until 1958 when it was done away with and crimes restricted to those offences expressly provided by the law.

Article 7 (2) of the European Convention and Article 15 (2) of the ICPR may be regarded as a contemporary attempt to dignify analogical extension of criminal laws and punishments. This attempt finds comfort in the important objection to the principle of legality that a strict adherence to the principle would detrimentally leave unpunished immoral and dangerous conduct not provided for by law. In other words, in terms of the principle no conduct which falls outside the nominate crimes can be prosecuted no matter how reprehensible or morally objectionable it might be. Therefore, there ought to be, it is argued, a residual general catch-all public-mischief offence to deter any

conduct which though outside the nominate crimes yet is prejudicial to the public welfare.

§3. For law application

The principle of legality involves the strict construction of criminal statutes. In recent times however strict construction has lost much of its force and importance. It is now recognised that the paramount duty of the court is to put upon the language of the legislator, honestly and faithfully plain and rational meaning and to promote its object. There are therefore those who would argue that it would be impolitic to say that whenever there is any doubt as to the law the defendant must be given the benefit of it.

Strict construction was resorted to in the eighteenth and nineteenth centuries when the criminal law was still barbaric. The reason for this expedient was the need to mitigate the harshness and ferocity of the criminal law of the day. Under the thin disguise of strict construction, courts readily resorted to the rule that the benefit of the doubt goes to the accused. Courts also readily resorted to any narrow interpretation, however pedantic, that had the effect of avoiding the death penalty or other severe and disproportionate penalties which at that time were commonly prescribed for most crimes.

Nulla poena sine lege does not of course mean that the exact sentence to be passed by the judge must be set out by law. Few, if any, are the legal systems that provide for fixed sentences without allowing the judge a measure of sentencing discretion. Most systems provide for a sentencing scale. Prescribed custodial penalties are minima, maxima, or minima and maxima, allowing the judge a sliding scale within which to select an appropriate sentence that fits the criminal and the crime. In fact the court is not obliged to impose any sentence at all. The modern tendency is to order, in the discretion of the court, a variety of alternative methods for dealing with the offender: binding over, community service, suspended service, probation, and the like.

Thus, *nulla poena sine lege* means only that the court cannot invent new punishments, cannot exceed the statutory maximum, and cannot go below the statutory minimum. But this statement calls for qualification. The maximum penalty that may be provided for a particular crime may be illusory as a safeguard of liberty. There may be an aggravation of responsibility. The judge may be empowered to sentence to consecutive terms of imprisonment or to a cumulative fine. In any such case the maximum sentence may be fantastically high. So, legal maxima no longer operate as a substantial safeguard of liberty against possible abuse by the judge. But this result is not to be regretted. Any statutory scheme of penalties that imposes a real restriction upon the

discretion of the judge is inconsistent with the notion of individualisation of punishment.

Section 3. Criticism of and inroads into the principle

§1. Criticism

A criticism of the principle of legality is that in its application to judge-made law it necessitates the drawing of a tenuous line between interpretation and innovation. In clarifying the criminal law through interpretation the judge may legitimately create new crimes. By denying the judge this creative role which is important when there is a gap in the law and parliament is supine, legitimate interpretation is considered as illegitimate extension.

The principle is further criticised on the ground that it does not give the judge sufficient room to take account of the personality of the individual offender when he comes to sentencing. Some have therefore suggested that the judge ought to be allowed a free hand to impose such punishment as the circumstances of the offence and the personality of the individual offender warrant. But that may be putting too much trust and power in the judges, something history cautions against.

§2. Inroads

Partly because of the above criticisms the principle of legality now suffers some inroads. For example, judges now tend to adopt an increasingly activist role in the interpretation of offences and penalties. If an offence is, in the considered opinion of the courts, too widely drawn for comfort the tendency would be to adopt a very narrow interpretation of the offence even in the teeth of a presumed legislative intent in favour of a wide interpretation. Similarly, if the judiciary considers the penalty provided for an offence unwarrantedly disproportionate it may seek to go round the harshness of the prescribed penalty by appealing to any applicable principle the effect of which would result in mitigation of punishment or it may even acquit on a mere technicality.

It is conceded that the wider and more imprecise the criminal law, the greater the possibility of somebody being caught who was not meant to be caught. It is further conceded that a vague penal law is an evil for citizens who want to know how they stand in regard to the criminal law. So the modern tendency is thus to have crimes defined with relative precision. Perversely though, the more precise the law, the easier it is for evil-doers to skate around it. This dilemma results in opposite pressures: the pressure to make the criminal law certain, and the pressure to make it adaptable.

The Principle of Legality: Sources of Criminal Law; Judicial Oversight

Generally, the expression ‘sources of law’ means the formal sources of law. Discourse on the source of law invites an inquiry into the provenance of the law; an inquiry into where the law emanates or comes from, and who the lawgiver is. By examining the sources of law one is able to know or determine whether a given rule or norm of human conduct is law or not. This in turn invites a further consideration of the authorities competent to make law and the manner in which law is made.

In modern constitutional law theory the positive law emanates from the authorities designated by the constitution as empowered to make law. Under the constitution, primary law making power is vested in parliament consistent with the doctrine of separation of powers. Limited lawmaking power is conceded to the executive branch of government: the competence to conclude treaties binding upon the state on ratification by parliament; and the competence to make law by way of statutory instruments that may take a variety of names¹.

The constitution itself is law, the supreme law of the land. The power to make and enact the constitution, that is to say, original constituent power, vests in the people as a whole in virtue of the doctrine of the sovereignty of the people. The constitution, treaties, legislative enactments, and various duly made executive instruments constitute the primary sources of positive law. The secondary sources of law are custom, case-law² and general principles of law. But these are completely insignificant as sources of rules of criminal law and may be ignored in this discussion. The constitution, treaties, Acts of Parliament and statutory instruments are therefore the formal primary sources of rules of criminal law.

¹ Examples are ordinance, decree, order, regulation, and bye-law.

² This is the case where *stare decisis* or the doctrine of binding precedent prevails.

Section 1. Sources of the rules of criminal law

§1. The Constitution

Constitutions always provide for the impeachment of the head of state and/or members of government. In some constitutions the crime of treason or high treason is specifically designated as an impeachable offence.³ Credible national constitutions provide for the impeachment of the State President if he has committed any violation of the constitution or is guilty of any gross misconduct. Assuming that a parliamentary motion for the impeachment of the president is passed the allegation would then be investigated by a special judicial tribunal appointed by the Chief Justice. If the tribunal finds that any particulars in the allegation have been substantiated it will so report to parliament, which may then resolve that the President has been found guilty. The effect of such a finding is that the president ceases to hold office. Once out of office he may then be charged with any criminal offence committed by him in his personal capacity while he held the office of President, if Parliament has by resolution determined that such proceedings would not be contrary to the interests of the State.

§2. International law

Treaties. Treaties are bilateral or multilateral agreements between subjects of international law creating binding obligations in international law. Every treaty creates binding legal obligations on the contracting states. Treaties are thus a source of law, though in many countries some treaties may require statutes to make them effective. The President has power to negotiate and sign international agreements and may delegate the power to do so. The state expresses its consent to be bound by a treaty through any of the following methods: signature, exchange of instruments constituting the treaty, ratification, acceptance, approval, accession or succession. More commonly however a treaty provides that it shall become binding upon ratification.

The power to negotiate and also to ratify international agreements may be vested in the President. More usually the power of ratification is vested in Parliament. A duly ratified treaty thus becomes binding on the state. Ratification is however not automatic. The constitution may require parliament's prior approval of a treaty before its ratification by the executive.

³ For example, Article 53 of the Constitution (1996 version) of Cameroun Republic creates what it calls a 'Court of Impeachment'. The same provision vests in this special court jurisdiction to try the President of the Republic, the Prime Minister, government ministers, and high state officials for high treason and conspiracy against the security of state, in respect of acts performed in the exercise of their offices. It is hard to see how this court can possibly try and convict the President while he still holds office as President.

Thus in some countries a treaty dealing with any matter falling within the exclusive lawmaking domain of Parliament may be ratified only after it has been submitted for approval and has been approved by Parliament. Further, if a signed treaty has particularly important consequences, a bill to ratify it may be submitted to a referendum.

Where does a treaty to which a state is party stand within the municipal legal order? In monist states a duly promulgated treaty when published in the Government Gazette has, by command of the national constitution, direct domestic application. The treaty thus internalised (i.e., ‘domesticated’, as it is sometimes said), becomes part of the law of the land and ranks above any legislative enactment both prior and subsequent to it. This fact is acknowledged in section 2 (1) of the Penal Code in these terms: “This Code and every provision of criminal law shall be subject to the rules of international law and to all treaties duly promulgated and published.” The monist state engages its responsibility both internally and internationally if it is in breach of any provision of the treaty. This means the state may be made to answer for such breach before the appropriate municipal or international tribunal.

In dualist states by contrast the treaty will have domestic force only if it has been transformed into municipal law, that is to say, when parliament would have, by an enabling instrument adopted and adapted the treaty (partially or wholesale) as part of national legislation. When that happens, internally the treaty metamorphoses, as it were, from an international agreement into a domestic piece of legislation of the dualist state and may be given domestic effect by the municipal courts. A treaty thus integrated into the domestic legal order of the dualist state would, given the notion of the constitution as the supreme law of the land, stand in a position subordinate to the constitution but coordinate with legislative enactments. However, although an internalised (‘domesticated’) treaty stands on a footing of normative equality with legislative enactment, a new domesticated treaty prevails over an earlier statute and a new statute prevails over an earlier domesticated treaty. This follows from the maxim, *lex posterior derogat priori*, that is, a later law prevails over an earlier one.

Customary international law and crimes of international concern.

The international community generally recognises certain types of wrongdoing as international crimes for which individuals can be held personally responsible. The offenders may be prosecuted before both national courts, and international criminal courts with jurisdiction to do so. Some wrongdoings are thus both crimes under international law and under the domestic law of

many states. Piracy on the high seas is one such offence. Customary international law allows any state to arrest and try a pirate. Likewise, the export and import of narcotic drugs, aircraft hijacking, hostage taking and other acts of terrorism are also crimes of common international concern.⁴ These crimes, like sea piracy, are considered as attracting universal jurisdiction. There are other types of wrongdoing which are crimes under international law regardless of whether they are also crimes under municipal law. For example, genocide, torture, slave trade, human trafficking, money-laundering, crimes against humanity, war crimes, and international terrorism.

Section 11 of the Penal Code specifically mentions some of these international offences. It provides:

“The criminal law of the Republic shall apply to piracy, traffic in persons, the slave trade, and traffic in narcotics committed within or without the territory of the Republic.”

The state asserts universal jurisdiction over these four enumerated offences. Since the criminal law of the state applies to these offences the courts of the state have jurisdiction to try them.⁵ This means municipal criminal courts will try and punish the perpetrator of any of these four international offences. However, a foreigner who commits any of those crimes abroad would not be tried here if he has not been arrested in or extradited to this country.⁶

All crimes of international concern form part of an emerging system of international criminal law. They are, generally, crimes over which universal jurisdiction is asserted. Any state that arrests and punishes the perpetrator of

⁴ See for example, the Hague Convention on the Suppression of Unlawful Seizure of Aircraft 1970, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents 1973, the International Convention against the Taking of Hostages 1979, the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973, the UN Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment 1984, the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, the Single Convention on Narcotic Drugs 1961, the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft 1961, the Convention on Laundering Search Seizure and Confiscation of the Proceeds from Crime 1990, the Convention on the Prevention and Punishment of the Crime of Genocide 1948, the four Geneva Red Cross Conventions of 1949 and the two 1977 Additional Protocols thereto, the Rome Statute of the International Criminal Court 1998.

⁵ Section 12.

⁶ Proviso to s.11.

any of these crimes acts in the interest of the community of states. Treaties creating these offences often provide that state parties are obliged to punish perpetrators, even though the crimes are not committed within the party's territory or by its nationals. However, where international law does not authorise universal jurisdiction, a state may try and punish the individual perpetrator only if the offence was committed on its territory or by its national, i.e., the state would assume jurisdiction to try the perpetrator on the basis of the principle of territorial jurisdiction or on the basis of the principle of nationality.

Prosecution of crimes of international concern: the ICC. A milestone in the emerging system of international criminal law was reached with the adoption on 17 July 1998 and entry into force on 1 July 2002 of the Rome Statute of the International Criminal Court.⁷ That treaty establishes a permanent international criminal court at The Hague in the Netherlands with jurisdiction over persons, irrespective of their official capacity, for the most serious crimes of international concern. The 'most serious crimes of international concern' are: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.⁸ While the crime of aggression remains undefined for the time being, genocide, crimes against humanity and war crimes are defined in detail in the Statute.⁹ A State which becomes a party to the Statute thereby accepts the jurisdiction of the Court with respect to the four types of crimes that is the focus of the treaty.¹⁰

The International Criminal Court (ICC) is complementary to national criminal jurisdiction. What this means is that precedence is given to national courts when the state arrests an alleged offender, that is to say, States parties

⁷ A total number of 139 states signed the treaty by the 31 December 2000 deadline (China, Iraq, Israel and the USA being among the 7 countries that voted against it); 66 states ratified it as of 11 April 2002 and it entered into force on 1 July 2002. Of the 139 states that signed the treaty 108 have so far ratified it, among which are 30 African states. On the ICC generally, see Schabas WA, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, OUP, 2010. On the emergent discipline of international criminal law, see Cassese A, *International Criminal Law*, Oxford, OUP, 2008.

⁸ Article 5(1) of the Rome Statute. A historical note: in 1944 the Allies staged the Nuremberg and Tokyo trials for the prosecution and punishment of enemy war criminals of WW II. The judgments delivered by the ad hoc Nuremberg and Tokyo military tribunals established definitively the principle that the individual shall be held responsible for crimes against peace and crimes against humanity. These Judgments eventually brought about a general recognition for a more expansive definition of 'war crime' as well. Sunga LS, *The Emerging System of International Criminal Law – Developments in Codification and Implementation*, Kluwer, The Hague, 1997.

⁹ Articles 6, 7, and 8, Rome Statute.

¹⁰ It speaks volumes that Republic of Cameroun is neither a party to the Rome Statute nor to the UN Genocide Convention.

are required to utilise their own criminal tribunals in the first instance. The International Criminal Court will only exercise its jurisdiction when a national court is unable or unwilling to do so. The Court may exercise its jurisdiction only if one or more of the parties involved is a state party; the accused is a national of a state party; the crime is committed on the territory of a state party; or a state not party to the Statute may decide to accept the Court's jurisdiction over a specific crime that has been committed within its territory, or by its national.¹¹ These conditions do not apply when the Security Council acting under Chapter VII of the Charter of the United Nations, refers a situation to the Prosecutor.¹²

Though located at The Hague, the Court may exercise its functions and powers on the territory of any State party and, by special agreement, on the territory of any other state. A person who commits a crime within the jurisdiction of the Court is individually responsible and liable for punishment in accordance with the Statute. However, no provision in the Statute relating to individual criminal responsibility "shall affect the responsibility of States under international law."¹³

§3. Statute

The Penal Code. The principal source of the criminal law is the enactment known as the Penal Code. This document is in essence and by vocation a specimen of punitive legislation. It contains a codification of the general principles of criminal law; the more common offences against the state, against the general interest, and against private interest; and a wide range of regulatory offences. It spells out general principles governing the whole of the criminal law, lays down offences, and provides criminal punishment for the offences created.

¹¹ Article 12, Rome Statute.

¹² The issue of UN Security Council referral is hotly contested by African States who see this as a ploy by some Western Powers who are not even parties to the Rome Statute to promote their unhealthy political agenda in Africa through selective referrals of especially African political leaders for prosecution by the ICC. This issue came to a head in June 2015 when South Africa declined to arrest and hand over to the ICC Mr Al Bashir, the Sudanese President wanted by the ICC for crimes against humanity and for genocide. In June 2015, Al Bashir was in South Africa attending the African Union Summit held in Sandton, Johannesburg. An NGO filed an urgent application in the High Court in Pretoria for an order that the Sudanese President be arrested and sent to the ICC. The Court heard the application and granted the order. But by then Mr Al Bashir had left South Africa even before the formal closing ceremony of the AU Summit. The media and a section of the South African public opinion and opposition political parties blamed the government for allowing Al Bashir to 'flee', accusing it of breach of the Constitution of South Africa. The government was threatened with a lawsuit and the State President with impeachment.

¹³ Article 25(4), Rome Statute.

Other legislation containing criminal provisions. However, not all of the criminal law is contained in the Penal Code. A fuller picture of the criminal law in this country must also take account of penal provisions in several non-repressive specialised legislation such as the Labour Code, the Customs and Excise Code, the Highway Code, the Electoral Law, the Tax Code, the Public Order Law, the Forestry Law, etc. The object of this type of specialised pieces of legislation is not primarily punitive but to incline citizens to behave in a particular way in the fields covered by the legislation. The penal provisions they contain constitute only a threat meant to induce behaviour consistent with the provisions of the piece of legislation concerned.

Constitutions that ape the French model distinguish between two lawmaking domains, the legislative domain and the regulatory domain. Matters specifically listed in the legislative domain are reserved for Parliament which legislates in respect thereof by way of Acts of Parliament. The residue of matters, unspecified, is made the subject of rule-making by the Executive branch of government by way of decrees, regulations and orders. Matters listed as falling within the competence of the legislative domain include the creation of felonies and misdemeanours and the determination of penalties of all kinds. The creation of regulatory offences is usually not listed as one of the matters falling within the competence of the legislative domain.

Statutory and regulatory offences. Parliament is thus constitutionally vested with the power to create the most serious offences, known as felonies¹⁴, as well as intermediate offences, known as misdemeanours¹⁵, and also to lay down the attendant punishment¹⁶ for any offence or category of offences. But the legislative domain is not an exclusively reserved domain of Parliament. Parliament does not enjoy a monopoly in the creation of serious offences. It may, for a limited period and for given purposes indicated by itself, authorise the State President (apparently at his request) to create felonies and misdemeanours in a formalised legal instrument denoted as an ‘ordinance’. The ordinance thus issued by the President has the force of an Act of Parliament, which means both are on the same normative level. What this in

¹⁴ By s. 21 (1)(a) a felony is “an offence punishable with death or with loss of liberty for a maximum of more than ten years.”

¹⁵ By s. 21 (1)(b) a misdemeanour is “an offence punishable with loss of liberty or with fine, where the loss of liberty may be for more than ten days but not for more than ten years, and the fine more than twenty-five thousand francs.”

¹⁶ The Penal Code in sections 18, 19 and 20 provides for principal penalties (death, imprisonment and fine), accessory penalties (forfeiture, publication of judgment, closure of an establishment, and confiscation) and preventive measures (ban on occupation, preventive confinement, post-penal supervision and assistance, confinement in a special health institution, and confiscation).

effect means is that the President has, within the limits of express parliamentary delegation, the power to create even serious offences and determine their penalties.

The power to create simple offences is a matter excluded by omission from the legislative domain and lodged by necessary intendment directly and exclusively in the regulatory domain. Such offences are created by the President through regulatory instruments known as decrees. They may also be created by government ministers, heads of territorial sub-units, and local councils by way of regulatory instruments denoted as orders. Members of the executive branch of government may create regulatory offences but they have no power to determine penalties attaching to any such offences.

The *corpus* of the criminal law in this country thus includes: (i) offences indicated in the constitution; (ii) offences that are international crimes under customary international law and in treaties subscribed to by the State; (iii) offences in the Penal Code, in penal ordinances and in various non-repressive specialised pieces of legislation; and (iv) regulatory offences created by the executive.

Section 2. Role of the courts

§1. Judicial control of the constitutional validity of criminal legislation

A critical indicator of a democratic system is respect for the rule of law, one manifestation of which is judicial review. Judicial review is of two types: judicial review of the constitutionality of laws as in the United States, and judicial control of administrative actions as in Britain. The first type of judicial review is encountered in systems with a written constitution and is based on the doctrine of the constitution as the supreme law of the land, that is, the doctrine of constitutional supremacy.¹⁷ Its purpose is to uphold the supremacy of the constitution by ensuring that any other law inconsistent with the constitution is, to the extent of the inconsistency, invalidated. That system of judicial review thus empowers the court to declare void any law that is unconstitutional.

The second type of judicial review is encountered in systems 'without a written constitution' and in which the doctrine of parliamentary sovereignty obtains. The oft-cited system is the British one.

¹⁷ Anyangwe C, 'The Zambian Constitution and the Principles of Constitutional Autochthony and Supremacy,' vol. 29, *Zambia Law Journal*, 1997, p. 1.

“The doctrine of parliamentary sovereignty is so central to British political life as to give to Parliament full power over elections, legislation, and even the form and character of the government itself. So fundamental is this doctrine in the English ‘constitution’ that it is said that the courts have no power to modify or reject it. As a result of that doctrine, in Britain the constitution is still viewed as nothing more than a law established by the government, and alterable by the government.”¹⁸

The system does not empower the courts to pronounce on the constitutionality of Acts of Parliaments. The courts have no power to do so for two reasons. First, Acts of Parliament are considered unassailable because they are presumed to be an expression of the sovereign will of the people articulated by their representatives assembled in their parliament. Secondly, there is no special written law, by way of a constitution, that stands above legislative enactments and against which the validity of statutes may be determined. The entire focus of judicial control of administrative actions is to ensure that statutory instruments made pursuant to delegated legislation, as well as administrative actions taken by government ministers and local councils, are not *ultra vires* some enabling Act of Parliament.

The matter that falls for consideration in this section is, however, not judicial review in any of these two broad senses. The issue here is the situation that might arise in a criminal trial where the accused raises a preliminary objection to the constitutional validity of the offence under which he is charged. In liberal systems there are two ways in which a subordinate court might deal with such a challenge. The court might deal with it by way of case-stated or by way of a reference to a superior court for its opinion and direction.

Case stated. Case stated is the formulation of questions on points of law based on the relevant facts of a case for the opinion or judgment of another court.¹⁹ After the hearing and decision of a criminal or civil case by a subordinate court a party may require a case to be stated for the opinion of the Court of Appeal on the ground that the decision is wrong in law or in excess of jurisdiction. The subordinate court must then state the case as requested by

¹⁸ Anyangwe C, ‘Parliamentary Democracy and Constitutional Democracy,’ *Zambia Law Journal*, 1998, p. 94 at p.99.

¹⁹ Section 28 of the Southern Cameroons High Court Law, 1955, provides: “At any time during the hearing of a criminal cause whether in its original or appellate jurisdiction and before the decision of the court has been announced, the High Court may, and when so required by the Legal Secretary [read: Justice Minister] shall, *state a case* on a point of law for the opinion of the Supreme Court.”

the party. In the case of *The People v Anyuchili Tandakor*²⁰ the evidence before the Magistrate's Court trying the case disclosed a case of aggravated and not one of simple theft as was charged. The court declined to proceed with the case and adjourned judgment on the ground of lack of jurisdiction to try a felonious case such as that of aggravated theft. At the request of the prosecuting authority the court formulated the following questions for the opinion of the Bamenda Court of Appeal:

“(1) Is it the evidence in a case or the charge before the court on which the evidence is adduced that confers jurisdiction on the President of Court of First Instance [i.e. the Magistrate] before whom the charge is laid? If the prosecuting authority, in exercise of its powers of control over the institution of criminal proceedings before all courts, lays a charge of simple theft rather than one of aggravated theft may the Magistrate decline to try the case on the grounds that the prosecuting authority ought instead to have charged the accused before the High Court for aggravated theft?

(2) Is the institution of criminal proceedings before any particular court not the exclusive privilege of the prosecuting authority having regard to the circumstances of a particular case?

(3) Has the President of the Court of First Instance [i.e. the Magistrate] a right to refuse to convict for receiving where there is the evidence as per the charge before him and over which he has jurisdiction, merely because some elements of aggravated theft are disclosed?

(4) Is it not merely a matter of comment by the courts that the prosecuting authority ought to have instituted proceedings on a more severe charge instead of the less severe one on which an accused is indicted?”

The Court of Appeal (Thomas, CJ (President), Inglis and Ekor-Tarh, JJ (Vice Presidents) answered the questions thus:

(1) Primarily it is the charge at which the court must look to decide whether it has jurisdiction to hear and determine a case. Where, however, the evidence later discloses an offence other than the offence charged and that offence falls outside the jurisdiction of the court, that would result in an ouster of jurisdiction and the court will be bound to stay further hearing. A court cannot decline to try a case which comes within its jurisdiction and competence.

²⁰ (1971-1973) UYLR 136.

(2) There is nothing in the facts of the case to indicate that the court questioned the right of the prosecuting authority to institute criminal proceedings and we do not feel obliged to go outside of the facts to answer it.

(3) The court has no discretion as to whether it would or would not convict for the lesser offence charged where there is evidence in support of that offence, even though the evidence supports an aggravated offence for which it has no jurisdiction. The court is under a duty to convict for the lesser offence. This is implied in section 172 of the Criminal Procedure Ordinance. If the accused is convicted of the lesser offence he could not be subsequently tried for the aggravated one. However, if the court finds evidence in support of the aggravated offence it should direct the prosecution to amend the charge and transfer the matter to the appropriate tribunal. Should the prosecution exercise their right to decline to do so the court must discharge the accused on the lesser offence. Should the court decline to proceed to judgment, having tried the lesser offence, an order of mandamus may be granted by the High Court to compel the Magistrate to determine the matter. The discretion whether a more serious charge should or should not be preferred in particular circumstances must be left to the prosecution. In deciding whether or not to proceed on the aggravated offence the prosecuting authority may be prompted by considerations which lie outside the competence of the Court to question.

(4) The answer to the fourth question is implied in the answers to the foregoing questions.”

If no party to the proceedings applies for a case to be stated, the subordinate court, if of the opinion that the case raises a substantial question of law or of constitutional interpretation or application, may stay the proceedings and on its own initiative state a case for the opinion of the Court of Appeal. The particulars to be set out in the case stated usually include any submission of law made by or on behalf of the accused person during the trial, and any question of law which the subordinate court desires to be submitted for the opinion of the Court of Appeal. In *Martin Ekeke Maewo v Vava Lunje*²¹ the Full Bench of the West Cameroon Court of Appeal (Kesiro, Dervish, O'Brien Quinn and Ekema, JJ) was asked three questions by way of case stated, by Endeley, CJ, sitting as a Judge of the High Court. The questions related to the application of customary law and the transfer of cases from one customary court to another. The Court of Appeal stated its opinion on the questions of law posed to it and communicated it to the learned Chief Justice.

²¹ 1971-1973) UYLR 18.

*In the Matter of Case Stated in Daniel Angoh v Ajong Deba & 2 Others*²² two identical civil suits were before the Mbengwi Magistrate's Court. Both cases involved marriage under customary law. During the hearing of one of the cases counsel for the defendant took objections to the jurisdiction of the court. The Chief Magistrate declined to rule on the objection²³ and decided to state a case for the opinion of the Bamenda Court of Appeal. The issues involved arose from the following facts. The plaintiff married the daughter of the first defendant under customary law. The second defendant later seduced the girl who then went to live with him permanently as his wife. Plaintiff sued to recover either his wife or his bride price of 50.415 francs and 75.000 francs general damages. Following these facts the Magistrate's Court stated the following case for the opinion of the Court of Appeal.

(1) Whether the provisions of section 18(2)(a)(i)-(iii) of the Magistrates' Court Southern Cameroons Law 1955 have been fettered or paralysed by the provisions of section 13 of Ordinance 72/4 of 26 August 1972 [Judicial Organisation] when the suit before the Court of First Instance [i.e. the Magistrate's Court] discloses a value 1 franc to 500.000 francs that court can assume jurisdiction.

(2) Whether the Court of First Instance can decline jurisdiction in a civil suit where the particulars of claim disclose no monetary value notwithstanding the provisions of section 13(1)(a)(b)(c) and (d).

(3) Whether the Court of First Instance can entertain a suit to recover bride price out of a marriage contracted under customary law and if the answer to (2) above question is in the negative what is the effect of *Ronate Taping & 1 Other v Joshua Mobit*, BCA/31/74.

The Bamenda Court of Appeal (Ekor'Tarh, Nganje and Mbuagbaw, JJ, Vice Presidents) answered those questions as follows:

(1) It should be noted that Ordinance No. 72/4 of 26 August 1972 being a later law repealed by implications all sections of the earlier law, i.e. the Magistrates' Court Southern Cameroons Law 1955 which are repugnant to it. Although section 13(b) of Ordinance No. 72/4 of 26/8/72 raises the jurisdiction of the Court of First Instance in civil, labour and commercial matters to 500.000 francs, nevertheless it does not take away the civil jurisdiction of the Customary Courts or traditional court even when the

²² (1977) Bamenda Court of Appeal, Appeal No. BCA/5/77, unreported.

²³ The normal course would have been for the Magistrate to rule on the objection for any party dissatisfied with the ruling to go on appeal.

amount claimed is 500.000 francs or below. By virtue of section 26 of Ordinance No. 72/4 of 26/8/72 the provisions of section 18(2)(a)(i)-(iii) are reserved subject to the provisions of section 13(1)(a)(b)(c) and (d). ... This means that all the jurisdiction of the Customary Courts or traditional courts except the criminal jurisdiction are maintained. Section 18(2)(a)(i)-(iii) of the Magistrates' Court Southern Cameroons Law 1955 spells out the exclusive jurisdiction of the Customary Courts as opposed to that of the Chief Magistrate. It follows that section 18(2)(a)(i)-(iii) is complementary to section 26 of Ordinance No.72/4 of 26/8/72 and subject to section 13(1)(a)(b)(c) and (d) of the same Ordinance except where otherwise stated as in section 16(1)(b) of the same Ordinance.

(2) No civil suit can be without a claim in monetary value except it is a civil motion in which a particular relief or order is sought as required by section 13(c) of Ordinance No.72/4 of 26/8/72.

(3) The Court of First Instance has no jurisdiction in matters of marriage under Native Laws and Custom and so cannot entertain claims to recover bride price where the marriage was contracted under Native Laws and Custom. This is so as the jurisdiction of the Customary Courts in such matters is retained by section 26 of Ordinance No.72/4 of 26/8/72 as read with section 18(2)(a)(i)-(iii) of the Magistrates' Courts Southern Cameroons Law 1955. The case BCA/31/74 cited to us has no bearing on the case stated and so it is not considered.

In the determination of a case stated the Court of Appeal confines itself to declaring its opinion on the point of law raised; it does not make any consequential order. After the Court of Appeal has given its opinion upon the question, the subordinate court in which the question arose will then dispose of the matter in accordance with the opinion given by the Court of Appeal. It would seem the Court of Appeal may, on application by a party, also state a case on a point of law for the opinion of the Supreme Court. It is however not bound to do so and may decline the application to state a case if it is of the opinion that the application is frivolous. In such a case it would probably then be open to the aggrieved party to seek relief by applying to the Supreme Court for an order of *mandamus* requiring the Court of Appeal to state the case.

Demurrer. Under the criminal procedure of common law countries an accused on trial may put forward a plea in the nature of a demurrer. This is one of the pleas in bar open to an accused person charged with an offence, but it seems it is now virtually obsolete. The accused may demur to the charge, that is, he may allege some substantial defect in the charge brought against

him. He may, for example, challenge the constitutional validity of the law creating the offence under which he is charged. The subordinate court must then deal with the challenge. If in the court's opinion the challenge involves a substantial question of law it would adjourn the trial, refer the issue to the Court of Appeal (somewhat like in case stated) and wait until the Court considers and gives its opinion upon the question. The Court may give such direction to the subordinate court as it deems appropriate. The subordinate court will then resume the trial and proceed as directed by the Court of Appeal.

An alternative system, of Civil Law inspiration, is one that requires the criminal court itself to determine the constitutional-validity question, but without power to invalidate the impugned instrument if indeed it is determined to be unconstitutional. Supposing that a person is charged with an offence under a regulation, a decree, an edict, an ordinance or a statute made by an authority acting *ultra vires* in the sense either that the instrument in question is unconstitutional or that it offends against the enabling law under which it purports to have been made. In that case, the accused is entitled to challenge *in limine litis* the constitutional validity, or the legality, as the case may be, of the instrument in question. The issue raised is not one of a jurisdictional bar since it is not contended that the court has no competence to assert jurisdiction over the matter. What is contended is non-justiciability. In other words it is argued that the matter cannot be tried because the 'law' on which it is based is unconstitutional and therefore void.

Given the desideratum of a speedy trial in criminal matters, it seems appropriate that the criminal court should be able to consider and decide the constitutional-validity question itself without having to state a case or to refer the matter to a superior court for consideration and decision. This jurisdiction which is conferred on the lower courts is a special one because ordinarily subordinate courts and even the Courts of Appeal in this country have no power to pronounce on the constitutionality of laws.

The system of judicial review of the constitutionality of laws *à l'américaine* does not exist in this country. If the court decides that the instrument in question is unconstitutional (or *ultra vires* an enabling law) it will not declare the impugned instrument invalid or void. It will simply decline to give the instrument legal effect, the consequence of which is that the accused will stand discharged. The fact that the impugned instrument is not invalidated but remains in the statute book *as if* it is a 'valid' piece of legislation may work injustice. That same tainted instrument may still be used to prosecute another person and if he fails to challenge its constitutionality, he may be convicted and sentenced under it. Clearly this system conduces to injustice and cannot be

said to be consistent with the rule of law, fairness, and equal treatment before the law.

§2. Judicial interpretation of criminal legislation²⁴

Judges play a key role in applying and interpreting the criminal law when deciding a case. Gaps often appear in the law. Definitions of key terms, even when supplied by the lawmaker himself, are not always devoid of ambiguity. Offences are sometimes couched in vague terms. A provision may be of doubtful import. When this happens, the judge, in order to give meaning and effect to the law, must use his initiative and good sense to remove any ambiguities and cure any defects through interpretation. In doing so he would be guided by the established canons or rules of judicial interpretation and may draw inspiration from views expressed by legal scholars in the available legal literature.

A judgment is a declaration of law: *judicium est quasi juris dictum*. The need for judicial interpretation does not arise in a vacuum. There must be a law or a legal provision that warrants interpretation. Only then would the question of judicial interpretation arise. A judge cannot interpret 'law' that does not exist. If there is no law then there is nothing to interpret. A judge who presumes to interpret an inexistent law would be like someone who attempts to hold the air in his hands, which is a physical impossibility.

Why judicial interpretation is called for. In principle, the law, as an orderly collection of rules, ought to be clear and unambiguous. In practice this is not always the case. Laws have to be interpreted to bring out their true meaning because words sometimes have multiple meanings. Moreover, laws are often the product of political debate and compromise. The practical value of legislation depends on the way in which it is applied. The application of law supposes a process of interpretation. Problems of interpretation of legislation arise mainly because of communication difficulty. Language is inherently ambiguous and vague. If language were an instrument of mathematical precision there would be no problem at all. The draftsman would then be expected to draft laws with divine prescience and perfect clarity.

Unfortunately, in our present world the power of expression still lags behind the power of thought. It is sometimes said that what is well thought out will be well expressed. But this is not always true. Apt words are not always found to convey precisely what one has in mind, especially when dealing with a subject as abstruse and intricate as law is. Words, it has been

²⁴ Anyangwe C, *The Cameroonian Judicial System*, CEPER, Yaoundé, 1989, pp. 227 *et seq.*

said, have a core of certainty and a penumbra of uncertainty in their application. Not infrequently therefore the draftsman is faced with the difficulty of finding unequivocal language by which to convey the intention of the legislator.

To interpret a statute is to seek out and assign the exact meaning of the words and phrases used in it. This exercise is necessary because it enables the proper application of the statute to the factual situations envisaged by it. Where the statute is clear and unambiguous no problem of interpretation arises. But where the meaning of a statute is unclear the statute will fall to be interpreted. Further, if there are uncertainties and ambiguities in the statute these would have to be resolved by a process of construction of the provisions containing those shortcomings.

Generally speaking interpretation or construction of statutes is part of legal reasoning. Law interpretation is thus primarily the duty of the courts. But modern legislation (and even contracts and memoranda of understanding or agreement) always contains a definition section, a mini legislative dictionary, in which the lawmaker himself prescribes definitions of key words, terms and phrases used in the statute. In some cases the lawmaker enacts a general interpretation statute²⁵ which then operates as a standing legal dictionary of some of the most important words and phrases commonly used in legislation. The definitions thus supplied by the lawmaker are authoritative and binding on the courts.²⁶

The basic task of the judge in interpreting any piece of legislation, whether criminal or not, is to ascertain and carry out the intention of the legislator. In order to do this judges resort to a number of recognised rules and principles.

Rules of interpretation: the literal or grammatical rule. The literal or grammatical rule ordains that the intention of the legislator must be found in the ordinary literal and natural meaning of the words used by the legislature in the statute because those words themselves best declare the intention of the lawmaker. In one case the court had to deal with the section of a law captioned ‘unnatural offences’ and which punished “whoever ... shall be guilty of ...any indecent assault upon any male person”. The question was whether the accused, a woman, could be convicted under the section. The court convicted, pointing out that a woman might be included in the word

²⁵ One such statute is the English Interpretation Act 1889; another is the Interpretation Ordinance, Cap 89 of the 1958 Laws, based on the English Act of 1889.

²⁶ Courts also have recourse to authorities such as *Maxwell on Interpretation of Statutes* and to authoritative definitions in established dictionaries, e.g. *Words and Phrases Judicially Defined*.

‘whoever’. That word, the court said, was a general term and its meaning too plain to need any reference to a possibly controlling context.²⁷

In another case the following words in a statute “any person who wilfully, pretends to be qualified to act as a solicitor” were held not to be applicable to a corporate body. In the view of the court the words ‘any person’ must be confined to any person who could become a solicitor;²⁸ a corporate body could not become such a person. In yet another case the question was whether a motorist who, on request by traffic police officers, failed to produce on the spot, but did produce a couple of hours later, his motor insurance certificate, was guilty of an offence under a law which provided that “any driver of a vehicle ... not in a position to produce ... a document evidencing its insurance ... shall be punished.” The court held that the phrase ‘not in a position to produce’ connoted an immediate act and thus gave no room for time to produce.²⁹

According to the literal rule therefore legislation must be expounded literally and it makes no difference that it produces an absurd or unjust result. “If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary meaning, even though it does lead, in our view of the case, to an absurdity or manifest injustice.”³⁰ It is for the lawmaker and not for the court to put such injustice right.

When there is a gap in the law, it is debatable whether the judges should fill in the gaps or to stick to the plain meaning of the law until parliament decides to fill in the identified gap. The weight of judicial opinion appears to be that the responsibility to fill in gaps in the law or to right any injustice flowing from a literal interpretation of the law falls squarely on the legislature. Judges cannot perform that task because to do so would be “a naked usurpation of the legislative function under the thin disguise of interpretation”³¹.

Both the Buea and Bamenda Courts of Appeal take a similar view. In *Commissioner of Police v. Henry C. Veenhuizen*³² the issue was whether a law which stipulated that the military court “shall have jurisdiction” over firearm offences

²⁷ *R. v Hare* [1934] 1 KB 354.

²⁸ *Law Society United Service Bureau* [1934] 1 KB 343.

²⁹ *The People v. Longpa Dieudonné* (1978), Bamenda Court of Appeal, Criminal Appeal No. BCA/2.c/78, unreported.

³⁰ Per Jervis, CJ in *Abley v. Dale* (1851) 11 CB 378, 391.

³¹ Per Lord Simonds in *Mayor & St. Mellons Rural District Council v. Newport Corporation* [1952] AC 189.

³² (1970), West Cameroon Court of Appeal, Criminal Appeal No. WCCA/11.c/69, unreported.

meant that that court had exclusive jurisdiction over those offences or that it had concurrent jurisdiction with ordinary courts over the same. It was urged upon the Court of Appeal that it had power to read into the phrase “shall have jurisdiction” the word ‘exclusive’. The Court declined to do so declaring that it cannot fill in gaps in the law and that it must stick to the plain meaning of the words used in the law. “The words of the section must be read in their ordinary and natural sense ... It would be wrong to read into the sentence the word ‘exclusive’ when it is not there and when the legislature could have easily inserted it had that been their intention.”³³

In *Direct Supplies Co. Ltd. v Cameroon Bank Ltd*³⁴ the arguments before the West Cameroon Court of Appeal revolved around the meaning to be ascribed to the words ‘order’ and ‘judgment’ in judicial proceedings, in particular the word ‘order’ which appears in section 65 of the Southern Cameroons High Court Law 1955. The section reads: “Subject to the provisions of this Law with respect to appeals in matters of practice and procedure, every order, made by a Judge in chambers, except such orders as to costs only which by law are left to the discretion of the Court, may, upon notice be set aside or discharged by the judge sitting in court.” Referring to the statement of Lord Esher M.R. in *Onslow v Inland Revenue Commissioners*³⁵, and citing *Words and Phrases Judicially Defined*, volume 4, the Court of Appeal held that a clear distinction exists at law between the words ‘order’ and ‘judgment’; and that a judgment is a decision obtained in an action, and every other decision is an order.

Rules of interpretation: the golden rule. Another method of interpretation, the golden rule, is a corollary to the literal rule. For obvious reasons the golden rule de-emphasises a strict adherence to the literal meaning of words. Words do not always have a plain and settled meaning. Words are capable of alternative equally valid meanings. Words, interpreted literally, could lead to an absurd consequence, or to repugnancy or hardship. Grammatical construction may be at variance with the intention of the legislature as gleaned from the statute itself. It may lead to inconsistency with the rest of the statute. This does not mean that the literal or grammatical rule is to be discounted. What it means is that the literal rule is only the first step in interpretation. The rule fails in the face of an ambiguity and must accordingly be abandoned to avoid an absurd or inconsistent result. Practically this means that in that situation the literal or grammatical construction yields to the

³³ Per Dervish J.

³⁴ (1971-1973) UYLR 41.

³⁵ (1890) 25 QBD 465.

golden rule. The golden rule requires words to be interpreted in such a way as to avoid a manifest absurdity or repugnance. It authorises departure from the plain meaning of words if a strict adherence to it would result in an absurdity or in a consequence at variance with the legislative intent as can be ascertained from the statute itself.

In one case³⁶ a literal reading of a piece of intestacy legislation indicated that the issue of uncles and aunts of the whole blood of an intestate must be passed over in favour of the issue of uncles and aunts of the half blood or in default of such issue to the crown as *bona vacantia*. This result was held to be so extremely absurd that the court refused to uphold it.

“This is a result so capricious and absurd and, moreover, so contradictory of another section that the court is entitled to strain every nerve to avoid it ... I take this course because I am convinced that Parliament, in laying down rules for ascertaining next of kin cannot have intended to promote those more remote over those nearer in blood. I decline to come to a conclusion which will necessitate holding that first cousins twice removed should be preferred to nephews and nieces.”³⁷

In *The People v. Okeke Okafor John*³⁸, Endeley J. interpreting s. 346 of the Penal Code said,

“[M]indful of the rule against giving absurd interpretation to statutes, I hold that from the moment a sexual assailant undresses himself or his victim or sets out so to do, he has committed or set out to commit an indecent act in the victim’s presence ... In the present case because I find that the defendant sexually assaulted the child I find also that he committed an indecent act on her and in her presence.”

Rules of interpretation: the mischief rule or purposive approach.

Where the words of a statute are not plain, then the purpose, scope and object of the statute must be considered. This involves a consideration of the context, that is, the setting in which the disputed words are placed and the design or object of the whole statute. This method of interpretation is known as the mischief rule or the purposive approach. The rule is designed to carry into effect the object and purpose of the statute. The rule directs the court to look at the context of the statute, the policy and purpose behind the statute,

³⁶ *Re Lockwood* (1958) Ch. 231.

³⁷ Per Harman J. in *Re Lockwood* (1958) Ch. 231.

³⁸ (1968) WCLR 60.

the spirit rather than the letter of the law, the mischief aimed at by the statute. What the rule demands is in fact a creative interpretative manoeuvre that consists in a broad and liberal reading of the text in response to the demands of justice.

The mischief rule combines what in some jurisdictions are two distinct methods of interpretation, the historical method³⁹ and the teleological method. The latter method consists in interpreting the words of a statute without considering either their historical origins or the original intention of the legislature, and with a view to giving the words a meaning which, at the time, satisfies the current sense of justice. The teleological approach thus allows legislation to be applied in cases outside the strict letter of the original legislation but within its contemporary social purpose.

Indeed the contemporary approach to statutory interpretation appears to lean in favour of the contextual method unifying three approaches – the literal or grammatical meaning of the words used, reading of the statute as a whole, and resort to permitted external aids to interpretation. In construing the provisions of the Penal Code, for example primacy would be given to the literal rule. In other words, the starting point would be to construe the words in the Code in their ordinary, plain and natural meaning. In doing so it is impermissible to resort to the law that existed before the introduction of a Code.⁴⁰ Such law, including the case-law based on it, might be persuasive but is not authoritative for the simple reason that the Code is not a textual reproduction of the pre-Code law. The presumption of statutory interpretation that an enactment does not alter the pre-existing law does not apply to codes.

However, if a certain provision in the Code is of doubtful import or if a word or expression used in the Code had acquired prior to the introduction of the Code a technical meaning it would be legitimate to refer to the pre-Code law in order to ascertain the Code meaning of the word or phrase in question. This in effect means resorting to permitted external aid. Moreover, the courts in interpreting the provisions of the Code, may invoke in aid and as persuasive authority the interpretation given to provisions in identical enactments in other jurisdictions. Furthermore, the court may also employ as an aid to the interpretation of the Penal Code the opinions of learned scholars on the subject.

³⁹ This method allows the interpreter to look at the legislative history of a statute to ascertain whether parliament had a clearly formulated view of the subject at hand.

⁴⁰ Per Lord Herschell in *Bank of England v. Vagliano Brothers* [1891] AC 107.

Aids to interpretation: specific principles. Apart from the above canons of statutory interpretation, the judge in common law jurisdictions often resorts to a number of specific principles and presumptions. One set of principles requires that the statute be read as a whole and the construction made of all the parts together. There is another set of principles which is based on grammar, syntax and logic: (i) *expressio unius personae vel rei, est exclusio alterius*⁴¹; (ii) *ejusdem generis*⁴²; and (iii) *noscitur a sociis*⁴³.

According to the *expressio unius* principle the expression of one person or thing implies the exclusion of other persons or things of the same class but which are not mentioned. Take for example, a law on refreshment houses in which the phrase “for public refreshment, resort and entertainment” appears. It was held that the word ‘entertainment’ in that phrase relates to bodily comfort in the accommodation provided and not to mental enjoyment as, for instance, a theatrical or musical public entertainment.⁴⁴

The *ejusdem generis* rule applies where there is a particular description of property, sufficient to identify what was intended, followed by some general or omnibus description. The principle then provides that where there is a list of particular species which can be grouped into one genus and these are followed by general words the scope of those general words is to be cut down to make them fit into the genus. The assumption is that the general words are only intended to guard against some accidental omission in the objects of the kind mentioned and are not intended to extend to objects of a wholly different kind. Supposing a statute defines a ‘traffic sign’ to include “all signals, warning sign posts, direction posts, signs or devices”. The word ‘devices’ would be construed *ejusdem generis* the preceding words. That would mean holding that a white painted line on a road is not a traffic sign.⁴⁵

Aids to interpretation: specific presumptions. Presumptions are mere aids or pointers to construction and not binding legal rules. The rule that a criminal statute is presumed not to be retrospective, the rule against analogical extension of offences, and the rule requiring criminal legislation to be narrowly construed all embody traditional notions of justice. In terms of the rule of

⁴¹This Latinism means the express mention of one person or thing is the exclusion of another.

⁴² Literally this means ‘of the same kind or nature’. In this context the Latin expression means where particular words are followed by general words, the general words are limited to the same kind as the particular words.

⁴³ This means the meaning of a word can be gathered from the context in which the word is used.

⁴⁴ *Muir v. Keay* (1975) LR 10 QB 594.

⁴⁵ *Evans v. Cross* (1938) 1 KB 694.

‘strict construction’, whenever the court has a difficulty understanding parliament’s intention in a statute that difficult should be resolved to the advantage of the accused person. This is somewhat analogous to the *contra proferentem* rule in contract law. According to that rule, when construing a contract, the court should adopt against the person putting forward (or who drafted) the instrument the construction least favourable to him. This doctrine applies where the person putting forward the instrument is the one who drew it up.

The Principle of Legality: Taxonomy in Criminal Law

Taxonomy (classification, categorisation, or characterisation) in criminal law is the scheme of classification of offences. It involves two things. The first thing is the arrangement of offences according to their correct legal categories: classification of offences. The second thing (an extension of the concept) involves determining and drafting the appropriate charge.

Section 1. Classification of offences

There are established criteria for arranging offences according to their correct legal category. The commonest methods of classifying offences are by their mode of commission, their objective gravity, and their nature.

§1. Classification by mode of commission

By focusing attention purely on the physical element in crime a distinction may be made between the following three pairs of mode of commission of offences: crimes of commission and of omission, simple and complex crimes, result and conduct crimes.

Crimes of commission and crimes of omission. Most offences in the Penal Code, as under the criminal law of other jurisdictions, are crimes of commission because generally, an offence consists of *doing* something forbidden by law. A crime of commission presupposes some physical act on the part of the offender, some specific result, and a causal connection between the act and the result. Exceptionally, however, an offence may be committed by the mere fact of refraining or abstaining from doing something which the law requires to be done.

A crime of omission, on the other hand, is an offence the gravamen of which is the failure to act when there is a legal obligation to act. Examples in the Penal Code are the following offences: failure to report¹, failure to suppress riot², non-intervention³, refusal to clear⁴, and failure to assist⁵.

¹ Section 107

² Section 145

³ Section 171.

⁴ Section 172.

⁵ Section 283.

Offences of omission used to be rare. Nowadays however, there is a tendency to create more and more such crimes in an effort to fight against excessive selfishness and falling standards of morality.

Simple crimes and complex crimes. A ‘simple crime’ is an offence consisting of one isolated single physical act or event, such as stealing, killing, assault or fraud. It may be instantaneous or continuing. A complex crime on the other hand is one that involves the commission of two or more distinct physical acts, coordinated and tending towards the same criminal purpose. Take for example, theft by false pretences⁶ which requires both deceit and causing loss, or aggravated theft by robbery⁷ which requires both violence and causing loss. In a complex crime the distinct successive acts may be committed in various places. For offences of this type time for prosecution begins to run as from when the last constituent physical ingredient of the crime was done. A complex crime is sometimes referred to as a ‘repeated crime’ or a ‘collective crime’.⁸

Result crimes and conduct crimes. The definition of some crimes includes not only the proscription of a particular conduct but also the requirement of a certain result flowing from the prohibited conduct. For example, murder is the causing of another’s death⁹; theft is causing loss to another by appropriating his property¹⁰. If there is no death, if there is no loss, then murder has not been committed, theft has not been committed. Offences

⁶ Section 318(1)(c).

⁷ Section 320(1)(a)(b).

⁸ The so-called ‘repeated crime’ is one which consists in the commission of several similar acts. Each of these acts taken in isolation does not constitute an offence, but the acts when taken together constitute an offence. It is the repetition of the act that makes the conduct criminal. Take for example, corruption of youth (s. 344), moral danger (s. 345), begging (ss. 245 & 246), furnishing place of refuge to malefactors (s. 99 (2)), adultery (s. 361 (2)). For each of these offences to be consummated the prohibited act must be repeated. In the language of those sections the act must be ‘habitual’. An isolated act will not do. But habitual or repetitiveness simply means more than once. Further, the conduct remains criminal whether the act was repeated against the same person or against several persons. On the other hand, a ‘collective crime’ is where several acts of the same nature and with the same purpose are committed, each of which taken independently constitutes an offence and all of them taken together constitute yet another offence. It is as though there is a collection of several distinct crimes but which considered as a whole constitute just a single offence. For example, several acts of misappropriation (s. 184), colourable resemblance (s. 210), counterfeiting note and coin (s. 211), and striking money (s. 215). Each act of misappropriation, each note counterfeited etc constitutes a distinct offence; and all the acts of misappropriation taken together constitute another offence of misappropriation that could be charged as a general deficiency, and likewise all the notes counterfeited could simply be charged as counterfeiting currency notes.

⁹ Section 275.

¹⁰ Section 318(1)(a).

of this nature are called result crimes because the forbidden result is an ingredient of the offence.

In contrast, there are those offences known as conduct crimes. A conduct crime is one where the act in itself constitutes the crime irrespective of the outcome or result of the said act. In this class of offences the result, if any at all, is not included in the definition of the offence, it is immaterial and so does not have to be proved. Examples are administering poison, cheating at an examination, breaking traffic lights, perjury, driving on the wrong side of the road, forgery, inchoate crimes. Poisoning is an offence whether the person poisoned dies or not; and any consequence, such as grievous bodily harm or death, may be charged and prosecuted as a distinct offence. Cheating at an examination is an offence whether the cheater passed or failed the examination. Driving through red traffic lights or driving on the wrong side of the road is an offence whether or not the conduct occasioned an accident. Forgery is an offence whether or not the forger gained a pecuniary or other advantage from it. These offences are made punishable by reason of their mischievous tendencies.

Now if attention is focused purely on the mental element in crime one may differentiate between the following two pairs of mode of commission of offences: instantaneous and continuing crimes, and intentional and non-intentional crimes.

Instantaneous and continuing crimes. An instantaneous crime is one which is committed and consummated instantly at a specific moment (e.g. theft, assault, murder) even though its effects may last (e.g. as in the case of bigamy) or even though time might be a critical factor in its commission (e.g. as in the case of desertion of spouse). The statute of limitation begins to run from the moment of consummation of the offence.

A continuing crime on the other hand is one consisting of a continuing act or conduct lasting well beyond the moment of consummation of the offence and sustained by a lasting guilty intent. For example, carrying a concealed weapon, illegal wearing of decoration, and failure to return a child. The crime of carrying concealed weapons is consummated at the moment the concealed weapons are carried. The crime continues as long as the intentional carrying of the weapons lasts. The crime of illegal wearing of decoration is consummated at the moment the illegal decoration is worn. The crime continues for as long as the intentional wearing of the decoration lasts. The crime of failure to return a child is consummated the moment there is failure to comply with the order to return the child. The crime continues for as long as the intentional

non-return of the child lasts. In this type of offences time begins to run from the moment the continuation of the criminal act ceases.

Intentional crimes and non-intentional crimes. For criminal liability to attach it is not sufficient that a physical act contemplated and punishable by the criminal law should have been done; the physical act must have been done with the requisite mental element. There must be a mental element connecting the offender with the prohibited act he has done; and the mental element must exist concomitantly with the physical act. It follows that in order to create criminal responsibility the conduct in question must be one that is proscribed by the criminal law (the *actus* must be *reus*), the act must have been done with the necessary *mens rea* element specified by the criminal law, and both the *actus reus* and the *mens rea* must coincide in point of time. This is so because the criminal law punishes only wilful or voluntary acts. If the element of voluntariness is lacking then the offence is not consummated. This is true not only of intentional crimes (all felonies and most misdemeanours) but also of the so-called unintentional crimes (most simple offences or petty infractions and a few misdemeanours).

However, the extent to which intention is required is not the same in all offences. Sometimes the requirement of intention goes to the act itself; sometimes it goes to both the act and the consequences of the act. Where the offender intended both the act and its consequences and acted to bring about the said consequences it is said that he had the criminal intent. But where he intended only the act and not its consequences it is said he was reckless or negligent. He is reckless if he was aware of the possibility of the consequence of the act contemplated by him and yet still went ahead to act the way he did. He is negligent if, as a reasonable man, he should have foreseen the consequence likely to flow from his act and should therefore have refrained from doing the act, but he failed to do so.

An intentional crime is therefore one in which both the act and the result are desired or intended. An unintentional crime is one in which the act is wilfully done but the consequence is not desired due to recklessness or negligence. Negligence is failure to conform to the standard of care to which it is the defendant's legal duty to conform. It is failure to behave like a reasonable man in circumstances where the law requires such reasonable behaviour. A person can be negligent not only as to a consequence but as to a circumstance of one's act. Negligence is failure to foresee; it is sometimes described as carelessness or inadvertent negligence.

On the other hand, a person is reckless when he realises the probability of a consequence and he decides to chance his arm. He is aware, or he foresees

the possibility, of the consequence but he throws all caution to the wind and goes ahead to act. Recklessness is rashness or advertent negligence. The reckless person is more blameworthy than the negligent person. A person who acts recklessly is only a little removed from the person who acts intentionally, while the negligent person is one who is just daft or foolish.

§2. Classification based on the presumed objective gravity of the offence

The objective gravity of an offence is determined by the penalty prescribed for it. Each particular crime has a penalty attached to it. Based on this method of classification section 21 (1) of the Penal Code groups all offences into three categories, namely, felonies, misdemeanours, and simple offences. The provision enacts:

“(1) Offences shall be classified as felonies, misdemeanours and simple offences according to the principal penalties provided for them, as follows:

(a) a felony shall mean an offence punishable with death or with loss of liberty for a maximum of more than ten years;

(b) a misdemeanour shall mean an offence punishable with loss of liberty or with fine, where the loss of liberty may be for more than ten days but not for more than ten years, and the fine more than twenty-five thousand francs;

(c) a simple offence shall mean an offence punishable with imprisonment for up to ten days or with fine of up to twenty-five thousand francs.”

The consequences attendant on this classification are procedural and substantive.

The nature of an offence is unaffected by modification of the prescribed penalty as a result of mitigation or aggravation. By section 21(2) the nature of an offence (i.e. whether a felony, misdemeanour or simple offence) is not affected by “modification of the penalty imposed by reason of an excuse or of mitigating circumstances” or “aggravation of the penalty imposed under sections 88 or 89” of the Code. Supposing an accused is convicted of an offence which is a felony and, following the admission of mitigating circumstances, the court passes a sentence of imprisonment of less than ten years. The nature of that offence as a felony will not change; the offence does not become a misdemeanour on account of the sentence of imprisonment of less than ten years. Supposing also that an offender is convicted of an offence which is a misdemeanour and the court imposes a sentence of more than ten years imprisonment on account of the offender’s

previous conviction or of the fact that he is a public servant and has committed an offence against which it is his duty to guard or to take action. Again the nature of the offence as a misdemeanour will not change; the offence does not become a felony on account of the enhanced sentence of more than ten years' imprisonment. It is otherwise where the sentence imposed is enhanced not on account of the general aggravating circumstances provided in sections 89 and 90 but on account of special aggravating circumstances that may be provided in specific offences or in a particular law. The interplay of special aggravating circumstances is thus capable of transforming a misdemeanour into a felony.

Conviction for felony or for misdemeanour entails a number of different consequences. A conviction for felony or for misdemeanour has different consequences with regards to forfeitures, previous convictions, preventive confinement, post-penal measures, prescription, rehabilitation (by the court), and reduction of penalty incurred due to diminished responsibility¹¹ or mitigating circumstances¹².

As a general rule, sentence for a felony attracts all the forfeitures in section 30 of the Penal Code for the duration of the sentence and for ten years after release from prison. By contrast, sentence for a misdemeanour does not attract any of the forfeitures of section 30, except in specific cases stipulated by law.¹³ A sentence of preventive confinement may be imposed only on conviction for felony or misdemeanour¹⁴.

The penalty incurred by a person convicted for felony is not aggravated by reason of the fact that he had previously been convicted for misdemeanour. Equally, there is no aggravation of penalty where a person previously convicted for felony was sentenced to five years' imprisonment or less¹⁵ (evidently as a result of a mitigating circumstance or of a partial defence). It is the duty of the police and not of the magistrate to ensure post-penal supervision of persons sentenced for felony or misdemeanour.¹⁶ The limitation periods for prosecution are twenty years for felony, five years for misdemeanour (as well as for simple offence tried with misdemeanour), and two years for simple offence¹⁷. A convict who has served his sentence and has been released from prison may, after a stated time lapse, apply to the court for

¹¹ Section 87.

¹² Sections 91 and 92.

¹³ Section 31.

¹⁴ Section 39.

¹⁵ Section 88.

¹⁶ Section 40(2).

¹⁷ Section 67.

rehabilitation. The waiting time is five years if he was convicted for felony and three years if he was convicted for misdemeanour.¹⁸

The rule against consecutive sentences (i.e. the principle that sentences must be concurrent) applies only in respect of convictions for felony and/or misdemeanour. It is inapplicable in respect of simple offence.¹⁹ Procedurally, misdemeanours and simple offences are tried in the Magistrate's Court²⁰ following a summary procedure, while felonies are tried in the High Court on information after a preliminary inquiry must have been conducted by a magistrate.

Intention as a fault element is required only in respect of felonies and misdemeanours. By section 74(2) criminal responsibility "shall lie on him who intentionally commits each of the ingredient acts or omissions of an offence with the intention of causing the result which completes it." This core criminal law principle applies only in respect of felony and misdemeanour. It does not apply in respect of simple offence. Section 74(4) provides that "responsibility for a simple offence shall not require any intention to act or to omit or to cause the result." Further, the law on inchoate crimes (attempt, conspiracy, and accessoryship) applies only to felony and misdemeanour, not to simple offence.²¹

§3. Classification based on the nature of the offence

Under this head a distinction may be made between offences under the ordinary law, political offences, military offences, tax and customs offences (revenue offences), 'natural' offences, and 'artificial' offences.

Ordinary, political, and military law offences. Offences under the ordinary law are crimes which punish ordinary criminality and to which everyone is subject. Generally, these crimes are found in the Penal Code.

There are two divergent schools of thought on what constitutes a political offence. According to one school, a political offence is any offence against the existence or organisation of the state. But according to another, a political offence is one motivated by political considerations. The first view focuses on the result or consequence of the offence, while the second one considers the motive that prompts the commission of the offence.

¹⁸ Section 71(1).

¹⁹ Section 51.

²⁰ This court is also known as Court of First Instance.

²¹ Sections 94, 95 and 97.

A military offence is conduct which is a breach of military discipline and which, for that reason, may only be committed by a soldier. These offences are usually found in the military manual and are tried by a court-martial or military tribunal, and may be punished with peculiar sentences such as dismissal with or without ignominy from the military, reduction in rank, and so on.

Tax and customs offences. Tax offences are found in special legislation known as the General Tax Code. They are offences relating to direct and indirect taxation: personal income tax, business tax, registration tax, stamp duty. Tax offences often take the form of tax evasion or tax avoidance and are part of what criminologists refer to as ‘white collar crime’. The law of taxation generally provides for three types of penalties: criminal sanctions such as imprisonment, fine, disqualification from a particular employment; fiscal sanctions such as fine, surcharge, damages; and punitive administrative measures such as disqualification from bidding for or obtaining state contracts, withdrawal of driving licence, withdrawal of business licence, and the like.

The distinct impression one gets in the area of tax law is that the taxpayer is at the mercy of the tax man. The jurisprudence of the revenue court in England bears this out. In one case the judge said,

“In a taxing Act one has to look merely at what is clearly said. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”²²

In another case it was held that upon an appeal against an assessment, the onus of proof is upon the taxpayer by evidence given on oath or affirmation or by unsworn evidence that the assessments ought to be set aside or reduced.²³

Customs offences are contained in special legislation, the Customs Code. They exist to punish customs fraud, smuggling, evasion and corruption. A major peculiarity of customs offences is that proof of mental element is not required for most offences; only in a very limited number of offences is there need to prove intention. Many customs offences are therefore strict liability offences.

Furthermore, in order to facilitate proof of certain offences the Customs Code reverses the burden of proof by laying down a number of presumptions,

²² *Cape Bandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64 at p. 71.

²³ *Moll v. Inland Revenue Commissioners* [1955] TL 38.

such as the presumption of fraud (e.g. smuggling or importing/exporting goods without declaring them), the presumption of guilt (e.g. being found in possession of contraband goods), the presumption of knowledge (e.g. captain, pilot, or controller of air or sea or river vessel is presumed to have knowledge of contraband goods on board the vessel), the presumption that contraband goods seen being taken into a house are the same ones subsequently found in that house, the presumption that contraband goods found on premises belong to the owner of those premises, and the presumption that goods entering the country by sea without the required customs permit are smuggled goods. The rationale for these presumptions appears to be that the matters they deal with are peculiarly within the knowledge of the person concerned.

Another peculiar aspect of customs offences is that offences incurring a custodial sentence are rare. The penalty for most customs offences is a fine and/or confiscation. The emphasis is thus on monetary fines and these are, as a rule, quite stiff and may not be reduced by the trial court. Furthermore, the Customs Code, like the Tax Code, gives the officers of these departments a very wide margin of discretion, including even the power to bargain. Unfortunately this discretion is often abused and has proved to be a fruitful source of arbitrariness, corruption, unjust enrichment and political victimisation.

Natural and artificial offences. The so-called ‘natural’ offence is the crime *malum in se*. Crimes *mala in se* are offences which represent current morality. They embrace acts immoral or wrong in themselves, such as burglary, theft, arson, rape, incest, murder, assault, breaches of the peace, sexual deviancy, and are punishable by all nations. These crimes are based on certain higher moral values that people in all societies identify with and which the lawmaker cannot possibly fail to punish.

Crimes *mala prohibita* (the so-called ‘artificial’ crimes) are offences that are the result of administrative and social regulation. They embrace things prohibited by statute as infringing on other’s rights, though no moral turpitude may attach, and constituting offences only because they are so prohibited. These offences are sometimes called ‘quasi-criminal offences’ – offences that are regarded as not criminal in any real sense but as acts which in the public interest are prohibited under penalty. They are also called ‘public welfare offences’ or ‘regulatory offences’ or again ‘artificial offences’. Regulatory offences are not based on a general feeling of disapproval of the acts criminalised, but on contingencies which may be political, social, economic or administrative. Typical examples of regulatory offences are crimes against road traffic regulation, taxation, price regulation, the currency, rent and social

security laws. These offences are created for the purpose of controlling and directing contemporary society. They illustrate the pervasiveness of the law, the inescapable changing nature of society and the phenomenon of crime.

Section 2. Determining and framing the appropriate charge

The law of criminal procedure requires that the accused and the court be informed by the prosecution of the offence alleged to have been committed by the accused. The prosecution complies with this legal requirement by framing a formal written accusation of the offence alleged.²⁴

§1. Framing the formal written accusation

Meaning of ‘charge’, ‘charge sheet’, ‘information’, ‘count’. In the law of criminal procedure the term ‘charge’ has three possible meanings. It may mean a count of accusation of an offence²⁵. It may also mean a document (charge sheet) containing one or more counts of accusation of offences. Alternatively, it may simply mean the statement of the specific offence or offences charged. The context in which the term is used will often indicate which of these three meanings is intended.

In summary proceedings in the subordinate courts the formal written accusation against the accused person is called ‘a charge’. A charge is made in a document called ‘a charge sheet’. An accused person is arraigned in court upon a document or piece of paper known as a charge sheet. A charge sheet is the document before the court containing the charge or charges brought against the accused.

In the High Court, where trial is on indictment, the formal accusation is called ‘an indictment’ and it is made in a document known as ‘a bill of indictment’. Sometimes it is called a ‘bill of information’. The reason for this is that the body of the document is preceded by a preamble known as an information where the prosecutor informs the court of the offence or offences with which the accused is charged, e.g. “At the sessions, Holden at King Manga William Town on the ... day of ... 2014, the court is informed by the State Prosecutor on behalf of the People that ...”.

A bill of indictment, like the charge sheet, is the whole document containing the charge or charges brought against the accused. Each accusation in the charge sheet or in the bill of indictment is stated in a separate paragraph known as ‘a count’. A count is thus the precise accusation as written down in the charge sheet or in the bill of indictment. It follows that the charge sheet or

²⁴ See s. 152 of the Criminal Procedure Ordinance.

²⁵ A count has two parts, the ‘statement of offence’ and the ‘particulars of offence’.

the bill of indictment contains as many counts as there are offences brought against the accused.

Structurally, a count is in two parts. In the first part, captioned ‘statement of offence’, the prosecutor states the name of the offence allegedly committed. He does this by reproducing the specific legal name by which the alleged offence is known in the statute creating the offence and the exact section and name of the statute contravened and the penalty found. If there is no specific legal name of the offence then it should be stated in the charge in its ordinary name instead of its technical name, e.g. stealing rather than misappropriation.

The second part of a count is captioned ‘particulars of offence’. Here the prosecutor gives the brief facts or particulars of the alleged offence. He states the circumstances, time and place of the offence, and the person (if any) against whom or the thing (if any) in respect of which the offence is alleged to have been committed. He also provides such other particulars as will give the accused sufficient notice of the matter with which he is charged.

Generally, the particulars required to be contained in a charge sheet or a bill of indictment are: name of the person or persons accused, date of the alleged commission of the offence, place of the commission of the offence, statement of the offence committed, name of the person and of the thing against whom or in respect of which the offence was committed, the enactment and the section of the enactment allegedly contravened, and the signature of the person drafting the charge. The constituent parts of a charge sheet or a bill of indictment are: the heading under which there are indicated the name of the court and the venue²⁶ of the trial, the charge number, the title or the names of the parties²⁷, the preamble (in the case of a bill of indictment), the body which contains the charge or allegation made against the accused (statement of offence²⁸ and particulars of the offence²⁹), and the signature of the prosecutor who drafted the charge.

Assessing the facts of the case and evaluating the body of evidence gathered by the police. Drafting a formal written accusation of the offence is a process that entails a two-stage intellectual exercise. First, the prosecuting

²⁶ For example: ‘In the High Court of Oshana, Holdan at SA Georgetown’.

²⁷ For example: ‘*The People v James Enan*’. All prosecutions in this country are brought in the name of ‘the people’.

²⁸ For example: ‘Murder, contrary to section 275 of the Penal Code.’ If the allegation is that more than one offence was committed by the accused, each offence must be stated in a separate consecutively numbered paragraph referred to as counts.

²⁹ For example: ‘That you, James Enan, in Besongabang township, on or about the 17th day of June 2011, and in a bar called *Drink Like a Fish*, caused the death of one Agbor Ndip by stabbing him several times in the neck and chest, thereby committing an offence.’

authority carefully studies and analyses the facts of the case, in the light of the criminal law. The purpose of this exercise is to determine whether the facts and the available evidence gathered by the police during their investigation disclose the commission of any known offence under any written law. In assessing whether or not the conduct of the suspect amounts to an offence, the prosecutor mentally moves backwards in time to the moment when the suspect allegedly committed the offence. The conduct of the suspect freezes at that point in time, as it were, and only facts that existed as at that moment are material for the purpose of determining the criminal nature of the conduct. The conduct thus has to be assessed in the light of the law applicable at the time the alleged unlawful act was committed.

If the conduct, *ex facie*, amounts to a transgression of the criminal law then the prosecution proceeds to the second stage in the process. The exercise at this stage consists in ascertaining two things: the exact legal name of the crime that is alleged to have been committed³⁰, and the exact provision of the relevant criminal statute that has been violated. These particulars must appear in that part of the formal act of accusation which is known as the ‘statement of offence’.

The whole exercise is a relatively easy one since, consistent with the principle of legality, the lawmaker determines in advance what conduct is criminal and lays down a list of nominate crimes. In each case he provides that such and such abstract conduct, defined by certain ingredients or characteristics, amounts to an offence of a given category, punishable by this or that penalty.

Necessity for and importance of framing a charge. The necessity for drafting the charge arises because of the principle of legality. Since by that principle there is no offence and no penalty without a law, it stands to reason that whenever a person is accused of having committed an offence, the prosecuting authority must state in the act of accusation the exact legal name of the crime alleged to have been committed, the correct provision of the law the accused is alleged to have broken, and the date the law is alleged to have been broken. This means that the charge-sheet must contain the statement of offence giving the exact legal name of the offence, the specific provision of

³⁰ For example, if a fatal assault has been committed the prosecutor must determine and state clearly whether it is a case of ‘murder’ under section 275, or of ‘capital murder’ under section 276, or of ‘assault occasioning death’ under section 278. The prosecutor cannot simply charge ‘killing’ because there is no offence with any such legal name. Where the section defining an offence has subsections the prosecution must further state the appropriate subsection of the relevant section that has been transgressed.

the exact law that appears to have been broken, and the date of the offence. The charge-sheet must also supply the brief particulars or facts of the offence.

Framing the charge is important for various reasons. First, in terms of the principle of legality an act which is not a crime³¹ cannot be the object of a criminal prosecution. Even where a crime has been committed there may be no need to prosecute where the accused has a credible absolute defence. Secondly, the charge selected necessarily determines the penalty incurred. It also determines the court that has territorial and subject-matter jurisdiction to try the offence and the procedure that must be followed in the case. Thirdly, the written formal accusation gives the accused notice of the case against him and thus enables him to prepare his defence. Fourthly, the document serves another critical purpose: it tells the court what the trial is going to be about.

Responsibility for framing the charge. The task of working out the offence that has been committed and framing the appropriate charge falls primarily on the state prosecuting authority, constituted by state law officers. Also, an examining magistrate normally drafts a charge if, following a preliminary inquiry, the suspect is found to have a case to answer. This is not inconsistent with the presumption of innocence since at the pre-trial proceedings the examining magistrate is not concerned with the issue of guilt but simply with determining whether a *prima facie* case has been made out against the suspect.

That said, it is the main duty of the prosecuting authority to prosecute all those who have offended against the law. A trial normally proceeds on the charge as drafted by the prosecuting authority. But generally, the trial court is not absolutely bound by the charge as preferred by the state prosecutor. The court has power to grant leave to amend a charge after the accused has pleaded to the charge, or to amend a defective charge *suo motu* (on its own initiative), if the evidence adduced before it so warrants.³² In exercising this power, however, the court is required to stay strictly within the bounds of the facts of the case as elicited by evidence in court. The court cannot add or subtract facts under the thin disguise of amendment. It cannot draw up an entirely new charge, completely independent of the original charge filed by the state prosecutor. It is the duty of the prosecutor and not that of the court to draft a charge. Therefore, all that the court may do by way of amendment is to

³¹ Acts which are not criminal include suicide, adultery, fornication, farting, greediness, mere lie-telling in circumstances where there is no legal duty to tell the truth, killing rodents in one's yard, putting down one's cat or dog.

³² Sections 162 and 163, CPO

substitute a similar charge or permit the substitution of a similar charge for the original one.³³

§2. Multiple-offence situations: duplicity and misjoinder

Drafting a charge is a relatively easy exercise in the ordinary run of cases. But problems do arise particularly in multiple-offence situations where there is a risk of the trial being prejudicial to the accused if he is not informed with certainty of the exact charges against him. To avoid causing injustice to the accused and in the interest of fair trial, cases of multiple offences have necessitated the formulation of the rule against duplicity and uncertainty of charges, the rule against misjoinder of offences (i.e. offences wrongly joined in a count), the rule against misjoinder of offenders (i.e. persons wrongly joined as defendants who ought not to be), and the rule against ambiguity. Problems of duplicity of charges and misjoinder of offences arise only in circumstances in which the conduct of the accused constitutes two or more offences.

The rule against duplicity and uncertainty (ambiguity) of charges.

The rule against duplicity is basically that the charge (i.e. the specific allegation against the accused) or the count should not be double, meaning it should not contain more than one offence. No one count should accuse the defendant (except in the alternative) with having committed more than one offence except where separate and distinct offences form part of one act and one entire transaction. Every distinct offence with which a person is accused must be contained in a distinct count in the charge sheet and every such count must be tried separately.³⁴ The rule thus forbids the lumping of two or more offences, for example, rape and arson, in a single count or a single charge (e.g. ‘That you, Tih Nyamfuka, committed rape and arson’) as that might make it difficult for the accused to know precisely what case he is to meet and thus be able to prepare his defence. If two or more distinct offences are contained in one count the accusation or charge is said to be bad for duplicity.

Where multiple offences have been committed, each one must be charged in a separate count. If A steals several items from a supermarket, a count containing all the articles allegedly stolen would be bad for duplicity. The correct thing to do in such a case is to charge each act of stealing in a separate count of the charge sheet. Similarly, if a man steals money from different persons or from the same person on several occasions each act of stealing constitutes a separate offence and should be charged in a separate count rather than charging the aggregate sum stolen in a single count.

³³ Ibid.

³⁴ Section 156, Criminal Procedure Ordinance.

A series of distinct acts, though occurring in the same transaction may result in distinct offences. Each such distinct offence in the series should be separately charged. An example would be where a shoplifter goes into a shop on a shoplifting expedition and steals various articles from different shelves in the shop. In this example, each act of taking constitutes a distinct offence and should be charged in a separate count.³⁵ Similarly, if an accused assaults police officers in the course of a riot the assault on each of them is a separate and distinct offence and should be charged in a separate count: as many counts as there are police officers assaulted. A charge alleging that the accused 'assaulted police officers' is bad for duplicity because an assault on an unspecified number of persons is not one offence but the equivalent unspecified number of separate offences.

Assaults on or the killing of two or more persons are always charged as separate offences, i.e., as many counts as there are persons assaulted, as many counts as there are persons killed. Again, supposing the accused is charged with having ordered a number of persons to commit an offence. If he did so by talking to the persons collectively only a single offence is committed even though the persons ordered were more than one. But if he ordered each person individually as many offences are committed as there are persons ordered; a single charge would be bad for duplicity.

Where a count is bad for duplicity the court will set aside a conviction only if there has been a substantial miscarriage of justice. A conviction will not therefore be set aside just because of duplicity if there was no substantial miscarriage of justice. There are a number of relevant considerations that weigh in the mind of the court when deciding the issue whether or not there has been a substantial miscarriage of justice. The considerations include whether the accused was embarrassed by the duplicity; whether he was prevented from putting his defence to the various offences thus lumped together; whether the trial judge directed his mind to the fact that he was trying as many offences as were charged together, each of which required separate consideration of the evidence and a separate finding; whether the accused did not have any counsel at the trial; and whether counsel raised objections for duplicity or for defective particulars. If objection for duplicity is raised during the trial the prosecution may apply for and may be granted leave to amend the charge.³⁶ Further, a count or charge that is bad for duplicity would only be quashed on appeal if the Appeal Court is of the view that it has caused injustice to the accused.

³⁵R. v. *Ballysingh* 37 Cr. App. R. 28.

³⁶ Sections 162 and 163, Criminal Procedure Ordinance.

The situation is different in the case of uncertainty of charges. A charge or count in an indictment is said to be uncertain where it leaves the accused or the court in doubt as to what offence is charged. In such a case the prosecution must apply to amend the uncertain charge. If it is not amended, a conviction based on it may be quashed on appeal. The reason is that an uncertain charge or count makes it difficult for the accused to figure out what exactly he is being accused of and therefore leads to embarrassment.

Exceptions to the rule against duplicity. There are circumstances in which the law of criminal procedure allows two or more distinct offences to be contained in a single count in the charge sheet. These are exceptions to the rule against duplicity. The exceptions include offences of general deficiency of money, identical offences committed in a single transaction, and offences defined in the alternative in the enactment creating the offence.

(i) *General deficiency of money.* Offences relating to allegation of general deficiency of money can be charged together in one count of a charge. A typical case is the misappropriation of money committed over a period of time. For example, a cashier occasionally steals from his employer, undetected, for over a period of time, until the thefts amounting to a total sum of so much is discovered. The gross sum thus stolen is made up of individual sums stolen on various occasions. Each of these thefts is a separate and distinct offence and ought, on principle, to be charged in separate counts. But to do so would present a major difficulty: nobody other than the accused knows the time and amount of each theft. That being so the prosecution cannot possibly charge each of the thefts in separate counts as he will not be in a position to give particulars as to the amount and time of each theft. All he knows is that a specific total sum of money was stolen between a given period (presumably the time the cashier took over responsibility for the till and the time the thefts were discovered).

To overcome this practical difficulty and to ensure that justice is not defeated there has since been adopted a valuable rule of criminal pleading under which it is permissible to aggregate the monies allegedly misappropriated (between specific dates) and state it in a single count even though there are more than one acts of misappropriation involved. Where, therefore, a person commits several acts of misappropriation of public money³⁷ or of theft of money by misappropriation or false pretences³⁸ it is sufficient to specify the gross sum in respect of which the offence is alleged to

³⁷ Section 184(1).

³⁸ Section 318(1)(b)(c) and 321.

have been committed without particular items as to the specific amount of money stolen on each occasion of stealing or the exact dates on which each act of stealing took place. The charge so framed is deemed to be a charge of one offence.³⁹ It is therefore unnecessary to charge the accused with each of the misappropriations of the money in separate counts, except where each of the distinct thefts is provable in which case it becomes undesirable to include them in a count of general deficiency of money.

(ii) *Two offences forming part of one act and one entire transaction.* Two offences, one of which is the logical consequence of another or one of which flows naturally from the other may be charged in a single count. It is also permissible to charge more than one offence in one count or to charge only the more severely punishable offence where the same act or a series of acts give rise to two or more offences, one of which is either the logical consequence of the other or flows naturally from or merges with it. Supposing the allegation is that D received stolen goods. The facts show that the goods in question are the very ones D had stolen. Is D to be charged with stealing⁴⁰ and receiving⁴¹ in separate counts or in a single count or only with either offence? First, stealing and receiving are separate and distinct offences and cannot, on the face of it, be charged in a single count.⁴² Secondly, section 324 which punishes receiving does not require as a condition for criminal liability that the property held or disposed of must have been stolen by someone other than the receiver himself, though semantically to receive means to get from somebody.

Strictly speaking then, a person who holds or disposes of property that he has himself stolen can be charged with both stealing and receiving, each offence in a separate count. In reality, such a charge would be pedantic and oppressive because a person who steals would normally be expected to keep or dispose of the stolen property. It must be taken as the policy of the law that the punishment for theft takes account of the fact that a thief necessarily keeps or disposes of property he steals. In the example given the offence of receiving merges into that of theft and D should only be charged with stealing. The situation is similar to that of the man who burgles a house and steals therein. It

³⁹ Section 152(2), Criminal Procedure Ordinance.

⁴⁰ Section 318(1)(a).

⁴¹ Section 324.

⁴² However, Form 16 of the third schedule of the CPO provides a precedent for charging two offences, burglary and stealing, together in one count. That precedent is apparently good and sufficient in law when used in a case to which it applies. Arguably this precedent could be used in our example to charge the theft and the receiving in one count. But this would be exceptional indeed and in a count of this type it is wrong to pass two separate sentences on the stealing and receiving (or on the burglary and stealing) even if they are to run concurrently.

is a legitimate presupposition that if a man breaks into a house or burgles a house he does so with the intention of stealing therein. That is why in such cases it is usual to charge in one count both the breaking in and the stealing, or simply to charge aggravated theft which is the offence that is constituted by the combination of breaking in and stealing.

The position is otherwise where the physical and mental ingredients in the two offences are different or where one offence does not flow logically or naturally from the other one. Thus, if D steals and then he holds or disposes of property that R has stolen and handed over to him to hold or dispose of, D must be charged with the crime of theft and that of receiving in separate counts. If D breaks into a house and sexually assaults a woman inside the house, D must be charged with the two offences, housebreaking and rape, in separate counts.

(iii) *Offences defined in the alternative.* Offences defined in the alternative may be stated in the alternative in a single count. A written law creating an offence may state the doing of any act in the alternative, or the doing of any act in any different capacities, or with any one of different intentions, or it may state any part of the offence in the alternative. This exception deals with sections of enactments creating a single offence but where there are alternative ways by which the offence may be committed. In any such case the matters stated in the alternative in the written law may be stated in the alternative in the charge. Generally then, where a written law defines an offence in alternative terms, it is permissible for the charge to be stated in the alternative.

But this is not necessarily always the case. Much depends on whether the section of the written law constitutes a single offence or creates two or more distinct and separate offences. In the former case the charge may be stated in the alternative; but in the latter case it may not because different offences are involved. For example, if the law punishes anyone who ‘demands or takes’ a bribe, or who ‘demands or takes’ the property of another, or who ‘destroys, removes or displaces’ a boundary mark⁴³, or who ‘by assault or threat or by gift or promise’ corrupts a person⁴⁴, these various provisions consist of distinct and separate offences which must be stated in separate counts and not in the alternative.

An offence which can be charged alternatively must be such that it can be proved by the same facts. If the facts to be proved in one offence are not the same as the facts to be proved in the other offence then the two offences

⁴³ Section 317(a).

⁴⁴ Section 161(1).

cannot be joined and charged in the alternative. For example, rape⁴⁵ and assault occasioning grievous bodily harm⁴⁶ are not suitable for alternative charges. But a charge under s. 156 (1) of the Penal Code of assaulting a public servant by force or interference is suitable for alternative charges. Under the section force and interference are alternative ways of committing the offence. These alternative ways may therefore be stated in the alternative in a single count of assaulting a public servant.

Where charges are stated alternatively and the accused is found guilty on one charge, the court would abstain from recording any finding in respect of the alternative charge.⁴⁷ The accused having been tried and acquitted on one of the alternative charges he may not be re-arrested and prosecuted for the same facts differently charged. To do so will offend against the double jeopardy rule. The rule against double jeopardy ordains that an accused should not be put in peril twice on the same facts. It follows that if the accused has already been acquitted the prosecution cannot file another charge against him based on the same facts on which he had earlier been acquitted. The defence open to the accused in such a case is the plea of *autrefois acquit* (or *autrefois convict* if he had already been convicted for an offence based on the same facts).

(iv) *Identical offences committed in a single transaction.* Offences of the same kind or nature committed in a single transaction can all be contained in one count of a charge. It is unnecessary to put each such offence in separate and distinct counts. Supposing D, a police officer after arresting four offenders demands money from them to set them free and one of the arrestees gives the officer some money for and on behalf of himself and all the other arrestees. D's conduct offends against section 134 of the Penal Code which punishes corruption by a public servant or government employee. Since there are four people from whom the money was demanded should D be charged with four separate counts of official corruption or should all the four offences be lumped together in a single count of the charge? The offences are identical and if they were committed in a single transaction (i.e. D made the demand from all four arrestees together) it is permissible to charge them together in one count. But it would be otherwise if the offences are not identical or even if they are identical the demand was made from each of the arrestees separately. In such a case there would have to be four counts of official corruption.

⁴⁵ Section 296.

⁴⁶ Section 277.

⁴⁷ Sections 159, 161 and 180 of the Criminal Procedure Ordinance.

The rule against misjoinder of offences. The previous rule deals with duplicity, that is to say, the situation where the offender is charged with two or more offences in one count or in one charge. The present rule deals with the situation where several charges against the defendant are contained in the same charge sheet. The general rule against misjoinder of offences (improper joining of offences) is that, for every distinct offence with which a person is accused, there must be a separate charge contained in a charge sheet, and every such charge must be tried separately. In other words, every distinct offence alleged against D must be charged in a separate charge sheet and tried separately. If two or more offences alleged against D are contained in one charge sheet preferred against D the charge against D is bad for misjoinder of offences and thus a defective charge. Supposing D is charged with destruction of boundary marks⁴⁸, theft⁴⁹, and murder⁵⁰. For each of these alleged offences D must be charged separately. If the offences of destruction, stealing and murder are contained in one charge preferred against D, the charge against him is bad for misjoinder of offences and is thus a defective charge.

Exceptions. By way of exception to the general rule there are cases in which it is permissible to join several offences in one charge sheet (albeit in separate counts) and try them together. These cases are briefly considered below.

(i) *An offence affecting two or more persons or properties.* A charge in one count or in a single charge sheet will be proper where a single act constituting an offence affects, at the same time, two or more persons or properties. That single act constitutes one offence in respect of all those persons or properties. It is unnecessary to lay as many counts as there are persons or properties affected. Thus, if a person utters at one and the same time in one bundle a number of forged receipts, a one-count charge laid against him will be good.⁵¹ Similarly, a single count would be proper where a single corrupt demand is made from a number of persons jointly. Where, by contrast, the single act is repeated at different times in relation to the same person or property each instance of that act is a distinct offence and should be separately charged. For example, by section 206 (d) it is an offence punishable by imprisonment for anyone to make dishonest use of any genuine document belonging to another. This offence is committed on each occasion a dishonest use is made of the

⁴⁸ Section 317(a).

⁴⁹ Section 318(1)(a).

⁵⁰ Section 275.

⁵¹ Cf. *R. v. Thomas*, East P.C. 934.

genuine document and each instance of it should form a separate count. A count that merely charges the accused with having made a dishonest use of the document over a certain period would be bad for misjoinder of offences.

(ii) *Offences of the same or similar character.* Offences of the same or similar character, or part of a series of such offences, can properly be joined in the same charge sheet and tried together. Offences are said to be of the same kind if they are identical offences, for example two offences of arson. On the other hand offences are said to be similar if they share or exhibit some common features such that there is a link or nexus between them either in law or in fact. For example, theft *simpliciter*⁵² and aggravated theft⁵³ are similar offences, the difference between the two consisting in the fact that the latter is accompanied by some form of violence (use of force, use of a motor vehicle, bearing weapons, breaking in). Another example is unlawful killing. This criminal act is variously denoted as murder⁵⁴, capital murder⁵⁵, assault occasioning death⁵⁶, assault on ascendant⁵⁷, assault on child⁵⁸, or infanticide⁵⁹, depending on the requisite mental element in each case or on the relationship of the victim to the offender. These offences are similar in that the facts to establish any of them are similar, and, moreover, the evidence for either of those offences would be admissible to prove any of the other offences. Offences of the same or similar character can be joined together in the same charge sheet. Similarly a series of offences of the same or similar character can be contained together in a charge sheet.

(iii) *Offences falling within two or more definitions.* Where offences alleged against the accused comprise the same elements but fall within two or more separate definitions in the law they may be charged separately but in the same charge-sheet. Take two offences, bigamy and reckless driving, for example. Bigamy is a punishable offence under the Penal Code⁶⁰ and could be an offence as well under the Civil Status Registration Ordinance. Reckless driving is an offence under the Penal Code and also under the Highway Code. Here the act or omission constitutes an offence under more than one enactment. The accused

⁵² Section 318(1)(a).

⁵³ Section 320(1).

⁵⁴ Section 275.

⁵⁵ Section 276.

⁵⁶ Section 278.

⁵⁷ Section 351.

⁵⁸ Section 350.

⁵⁹ Section 340.

⁶⁰ Section 359.

has committed only one offence, and for that one offence he stands punished under two or more different laws or sections of the law. He has contravened two or more laws and is liable to be prosecuted and punished under each such law. The violation of each such law is an offence, though the conduct constituting that violation is the same in each case. A separate count should be drawn dealing with the same acts. All such counts should then be joined in the same charge-sheet and the accused tried at one trial for each of the offences.

However, if the trial results in a conviction the accused can be punished under only one of the different enactments. It is proper to charge an accused under two or more laws on the same facts, but as a matter of justice he cannot be punished twice for the same offence. Indeed, even though by the law of criminal procedure it is permissible to charge under all the various laws that have been broken, in practice the good prosecutor will only prefer a charge under one of the several laws creating the offence, usually the law that most severely punishes the conduct.

(iv) *Any three offences committed by the same person within twelve months.* One circumstance in which joinder of offences is permissible is the case of any three offences committed by the same person within twelve months, that is, a maximum of three different offences, whether in respect of the same person or thing or not, and whether of the same kind or similar character or not, are committed by the same person within a period of one year. The three offences may be joined in the same charge-sheet or information and tried jointly. The offences must not exceed three in number, and they must have been committed by the same person within a period of twelve months.

(v) *Offences committed in the course of the same transaction by the same person.* Another instance where joinder of offences is allowed is in the case of offences committed in the course of the same transaction by the same person, that is to say, where a series of acts or omissions are so connected together as to form the same transaction, or where the series of acts or omissions form or are part of a series of offences of the same or a similar character. The connected offences need not be in respect of the same person or thing. The test for 'the same transaction' is not proximity of time but continuity of action and sameness (or community) of purpose. An illustration of offences committed in the same transaction would be the case of the reckless motorist who knocks down several pedestrians causing them various degrees of injury, or who knocks down and injures a pedestrian and also damages property, or who careers off the road into a house doing much damage to it. Different offences have been committed. There will be as many counts as there are

offences but all the offences will be joined in one charge-sheet and tried together. If a man throws a bomb into a café killing four people and destroying the café he can be charged with four counts of killing (each count for each person killed) and one count of destruction of property. If a man drives his car recklessly and in doing so unintentionally kills a road user he can be charged with both reckless driving⁶¹ and unintentional killing⁶². If a man steals and he shoots and kills a security guard trying to prevent him from escaping, he can properly be charged with theft and murder. Similarly, if D commits rape in a public place he would stand trial on a two-count charge of rape contrary to section 296 (a crime against sexual morality) and of public indecency contrary to section 263 (which is a crime against public decency). In all these examples different mischiefs or nuisances are involved; different interests are involved and protected. In these examples each offence will be contained in a separate count but would be joined in one charge-sheet and tried together.

(vi) *Different combinations of the acts alleged constitute different offences.* Joinder of offences is also permissible where different combinations of the acts alleged constitute different offences. Supposing D is charged with two counts of assault occasioning death⁶³ and rash driving⁶⁴ arising out of one and the same set of facts. Two acts are involved here: unintentional killing by driving⁶⁵ and rash driving. When the act of unintentional killing and the act of rash driving are combined the effect is the unintentional causing of the death of the deceased by reckless driving, which singularly constitutes a different offence, assault occasioning death. The two distinct offences, unintentional killing and rash driving, may be contained in one charge-sheet and tried jointly.

An analogous situation is that in which an act constitutes an offence which becomes an aggravating factor or an element or a preliminary step of another offence. The offences here are of a similar character. The case where an act constitutes an offence and at the same time constitutes the aggravating factor of another offence may be illustrated with this example. The unauthorised entry by whatever means into another's residence is punishable under section 299 as invasion of residence. If D then enters another's residence without authority and steals from it, the unauthorised entry becomes an aggravating factor of the stealing, resulting in aggravated theft⁶⁶. Here only the charge of

⁶¹ Section 228 (2)(d).

⁶² Section 289(1).

⁶³ Section 278(1).

⁶⁴ Section 228(2)(d).

⁶⁵ Section 289(1)(4).

⁶⁶ Section 320(1)(c).

aggravated theft should be laid because unauthorised entry is subsumed under that offence.

The case where an act may constitute an autonomous offence in itself and at the same time is also a mere ingredient of another offence is not common. But the following example comes to mind. The act of public drunkenness is a punishable offence under section 243 (1) (a); but also it is merely an ingredient of the crime of driving a vehicle when drunk, punishable under section 228 (3). Here the prosecution will charge the more severe of the two offences on the theory of the lesser included offence. The third case is where an offence is committed merely to facilitate the commission of another offence. For example, a forgery is committed⁶⁷ so as to enable the commission of theft by false pretences⁶⁸. Here too only the more severe of the two offences will be charged. And if it fails the court may convict on the lesser proved offence.

Doubt as to the offence established by the facts which can be proved. Offences may be charged together or in the alternative where there is a doubt as to the offence established by the facts which can be proved. Thus, whenever the prosecution is doubtful which of several offences the facts that can be proved will constitute, the accused may be charged with having committed all or any of such offences and the charges may be tried together or he may be charged in the alternative with having committed some one of the said offences. It will then be left to the court to decide the appropriate offence out of the several charged that the prosecution has been able to prove by the evidence adduced in court. This prosecutorial strategy serves a useful purpose: it ensures that if the facts proved establish any of the offences charged, a conviction would be secured for that offence. However, the accused can only be convicted and sentenced for this one offence proved. He cannot be convicted and sentenced for more because to do so will be tantamount to convicting and sentencing him more than once for the same act. The trial judge may be uncertain which of the offences charged is established by the facts proved. In that case he can enter a verdict in respect of one count and stay the other count or counts or make a mere order of discharge on them.

It is noteworthy that if the facts of a case fall within any of the exceptions to the rule against misjoinder of offences, the court may nevertheless exercise its discretion and order that the charges be brought separately. The court will exercise this discretion where it is in the interest of justice to do so.

⁶⁷ Section 314

⁶⁸ Section 318(1)(c).

The rule against misjoinder of offenders. The general rule is that any person who is accused of an offence must be charged separately and tried separately for the offence. Supposing A is accused of rape, B of murder and C of arson. The three accused must be charged separately and tried separately, each person for the offence he is alleged to have committed. If the prosecutor charges all the three accused in the same charge sheet the charge will be bad for violating the rule against misjoinder of offenders.

There are six exceptions to this general rule. Persons may be charged together in the same charge sheet where they are alleged to have: (i) jointly committing the same offence; (ii) committed *different* offences in the course of the same transaction; (iii) committed the *same* offence in the course of the same transaction; (iv) committed an offence and others are abettors or attempters of the same offence; (v) committed offences that are related to each other; and (vi) committed offences during a fight or series of fights arising out of another fight, together with the abettors of any of these offences.

The Principle of Non-Retrospection: Application of the Criminal Law in Time

The principle of legality would make little sense if an act or omission which did not constitute a criminal offence (under either national or international law) at the time it was committed were afterwards to be declared a criminal offence. That is why that principle goes hand in hand with another fundamental principle, the principle which forbids the retrospective application of criminal laws. The link between the two principles is so strong that legislation and, in some countries, the national constitution¹, always provides for both. In this country, the principle of non-retrospection is stated in section 3 of the Penal Code, and extensions and implications of the principle are contained in sections 4 to 6.

Section 1. Statement of the basic principle

By section 3 of the Penal Code,

“No criminal law shall apply to acts or omissions committed before its coming into force or in respect of which judgment has not been delivered before its repeal or expiry.”

This principle, as statutorily formulated, has two limbs. The first limb is that no criminal law, be it under domestic or international law, made after the commission of an act or omission can make the said act or omission a crime.

¹ For example, Article II, Section 9 (3) of the US Constitution forbids the passing of *ex post facto* law. Article 35 (3)(l) of the Constitution of South Africa provides that every accused person has a right to a fair trial, which includes the right “not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.” Under Article 11(2) of the UDHR, “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.” This provision is textually reproduced in Article 15(1) of the ICCPR, but replacing ‘penal offence’ with ‘criminal offence’ and adding that “If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.” It is declared in the preamble of the Constitution of Cameroun Republic that “The law shall not have retrospective effect.” (“*La loi ne peut avoir d’effet rétroactif.*”)

The second limb is that no criminal law made after an act or omission that is the subject of pending proceedings shall apply to those proceedings.

§1. Criminal legislation not applicable to acts prior to its entry into force

In terms of the first limb of the principle of non-retrospection, “no criminal law shall apply to acts or omissions committed before its coming into force”. This limb of the principle limits the application of the criminal law in time as to the future. The law is forward-looking, prospective, and not retrospective. As a general rule (subject, of course, to any contrary provision of law) criminal law as governing the future can apply only to acts committed after that law entered into force. A law cannot be made today to apply as from yesterday for the simple reason that a law cannot exist before it comes into existence. As Thomas Hobbes said “No law made after the fact done, can make it a crime ... For before the law, there is no transgression of the law.”² If yesterday’s conduct is not an offence, a law made today cannot relate backwards to make that conduct an offence. Also, if yesterday’s conduct is an offence under an already existing law and the same conduct is now also criminalised under a new law in force as from today, that conduct will continue to be governed by and disposed of under the old law.

A law comes into force on the date indicated in the statute itself. If the statute is silent on this matter the law is deemed to come into force on the day following the date of its promulgation. The time of commission of an act or omission is easy to determine in respect of instantaneous offences but may not be easy to determine in respect of continuous offences.

The effect of the prohibition contained in this first limb of the principle of non-retrospection is to ban judicial reasoning by analogy and judicial analogical extension or interpretation of criminal laws. The result is that the principle of non-retrospection, like that of legality, calls for strict construction and interpretation of criminal offences.

“Perhaps no rule of construction is more firmly established than this; that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.”³

² Quoted in Williams G, *Criminal Law – The General Part*, 1961, p. 576.

³ Per Wright J. in *Re Athlumney* (1898) 2 QB 547 at p. 551.

Expressing a similar sentiment, Lord Reid thought it hardly credible that any government department would promote, or that Parliament would pass, retrospective criminal legislation.⁴ But this was done in Cameroun in 1972. In that year a law, Ordinance No. 72-16 of 28 September 1972 to amend certain provisions of the Penal Code, was issued creating, *inter alia*, the offence of aggravated theft carrying a mandatory death penalty.⁵ This very controversial piece of legislation expressly provided in its section 3 that its provisions “shall apply to offences in respect of which judgment has not been delivered on the date of its publication.” That Ordinance was thus given retrospective effect.

In some of the early cases prosecuted under this Ordinance defence lawyers called attention to a provision in the preamble of the Constitution which provides that, “the law may not have retrospective effect” and that, “no one shall be judged and punished except by virtue of a law promulgated and published before the offence was committed.” Counsel pointed out that the acts for which defendants were being prosecuted were committed before the passing of the Ordinance, a more severe law. They argued that the Ordinance in question was unconstitutional in that it violated the principle of non-retrospection and therefore ought not to be enforced by the courts. The challenge based on the unconstitutionality of that piece of legislation was unsuccessful.

Some courts ruled that the constitutional invalidity raised was misconceived.⁶ In the view of those courts the principle of non-retrospection inscribed in the constitution appears in the preamble and not in the body of the constitution. The preamble to a constitution, they reasoned, contains mere broad general principles, denuded of binding force as the preamble is outside the enacted part of the constitution. In any event, the courts further reasoned, criminal courts in this country have no jurisdiction to deal with the question of the constitutionality of laws. Other courts reasoned that the language of the relevant provision of the preamble was not mandatory but discretionary and that in any event section 2(2) of the Penal Code provides that “The first book of this Code shall govern all other criminal law, save as otherwise by law provided” and that by providing for the retrospection of the law in question the lawmaker has “otherwise by law provided.”

In *The People v Francis Nsaiben* (1972), the accused was charged with aggravated theft committed in December 1971. The charge was laid under s.320 of the Penal Code as amended by Ordinance No.72/16 of 1972

⁴ *Waddington v. Miah* (1974) 1 WLR 683 at p. 694.

⁵ This offence was incorporated in the Penal Code as section 320.

⁶ See the judgment of Ekoh-Tarh J in *The People v Asonganyi* (1973), unreported, and that of Inglis J in *The People v Francis Nsaiben* (1972), unreported.

prescribing the death penalty for the offence. He was tried in November 1972, sentenced to death on December 1972, and he appealed on the grounds of unconstitutionality of the Ordinance. The appeal was dismissed, confirming the conviction and sentence. In its judgment delivered by Inglis J, the Bamenda Court of Appeal reasoned that the phrase “the law *may* not have retrospective effect” means that “the law has retrospective effect unless such a construction [i.e. non-retrospection] appears very clearly in terms of the law or arises by necessary and distinct implication”. In the view of the Court the word ‘may’ is permissive and not mandatory. The case of *Abdu Yakubu v The People* (1975)⁷, was an appeal against the death sentence passed on the appellant by the Bamenda High Court following his conviction for aggravated theft committed in February 1971, one year ten months before the issuing of the Ordinance of 28 September 1972. The appellant relied mainly on the provision dealing with non-retrospection of law contained in the preamble to the constitution. He argued that the lawmaker could not have intended that the increased penalty of death provided for aggravated theft under the 1972 Ordinance should be retrospectively applied. In dismissing the appeal the Court of Appeal stated that the word ‘may’ in legal drafting imports a discretion and ought to be interpreted as meaning the law should not be interpreted as having retrospective effect except in a case where it is so categorically and clearly stated or where by necessary implication it can be so construed. In the view of the Court the use of the permissive ‘may’ in the provision in question contained in the preamble to the constitution permits the legislature to make laws having retrospective effect as the legislature so desires. The intention of the lawmaker, it said, cannot be gleaned from the preamble to an Act of Parliament or a constitution. Referring to s.3 of the Ordinance of 28 September 1972, the Court said, “The word ‘shall’ ... imports compulsion. The legislator in passing the Ordinance intended it to have a retrospective effect.”

This case may be contrasted with the enlightened and progressive decision by the Buea Court of Appeal in *Gregory Fru v The People* (1973)⁸. The facts of the case were similar as those of the preceding case. The appeal was on the same grounds as above and was allowed. The Court held that the offence falls within the protection contained in the provision of the preamble to the constitution which expressly forbids a man to be judged or punished except by virtue of a law promulgated and published before the offence was committed. As far as the Court was concerned, this protection subsisted notwithstanding the provisions of the 1972 Ordinance.

⁷ Bamenda Court of Appeal, Criminal Appeal, BCA/32c/75.

⁸ Buea Court of Appeal, Criminal Appeal, CASP/4c/73.

Arguably, the issue raised by these cases was the simple one as to which of two competing statutory provisions has primacy. Was it the provisions of sections 2(2) and 3 of the Penal Code (1965), or those section 3 of the Ordinance of 28 September 1972? Assuming that was the bone of contention then a credible argument would have been to assert that the same lawmaker enacted both documents and that in the 1972 document it was deemed expedient to depart from the principle of non-retrospection regarding the offences covered by it. However, when the discussion is elevated to constitutional level the first thing to point out is that as between a statute and a constitution the latter is a higher norm and none of its provisions can be modified by a lower norm. Some courts tried to make too much of a meal of the juridical value of the preamble of a constitution by reasoning that the contents of a preamble are in effect denuded of legal validity and cannot be enforced by the courts. That is untenable. Not all provisions in a preamble are in the nature of mere broad political statements and therefore incapable of juridical enforcement. The preamble to the constitution may contain enforceable legal norms such as, in the present case, the principle of non-retrospection. Further, neither counsel who argued, nor the judges who decided, those cases applied their minds to the Universal Declaration of Human Rights (Article 11(2)) and to the International Covenant on Civil and Political Rights (Article 15(1)), both of international human rights instruments binding on this country and having primacy over national legislation, including the constitution.

§2. Ongoing criminal trial not affected by modification in the criminal law

“No criminal law shall apply to acts or omissions ... in respect of which judgment has not been delivered before its repeal or expiry”. This second limb of the principle of non-retrospection limits in time the application of the criminal law as to the past. It contemplates two situations; the situation where a matter is still in the course of being tried, and the situation where the existing law governing the matter expires or is repealed. In terms of the second limb of the principle, a new criminal law that comes into force does not apply to criminal cases that are on-going. Those cases continue to be governed, and disposed of, by the old law under which the charges were laid. In sum, pending criminal proceedings are not affected by changes in the criminal law that are more severe.

In terms of the other situation contemplated by the second limb of the principle of non-retrospection, any act done and being tried under the old criminal law and in respect of which judgment has not yet been delivered

ceases to be punishable as soon as that old law either expires or is repealed by a new law. Any on-going trial of a person for that act ceases forthwith and the person set free. Criminal proceedings are terminated, causing an abatement of the criminal action. The prosecution of any person for that act is barred; no person may be arrested and charged for that act. What is more, even where judgment in the matter has already been delivered anyone already in jail for that act must immediately be released.

Suppose that D commits a criminal act. While his trial for it is still on-going the criminal law under which he is being prosecuted is repealed expressly or by implication, or it expires⁹. The criminal act will automatically cease to be punishable, which means D will be set free. The act will also cease to be punishable even where the trial is concluded but the judge has reserved judgment to be delivered at some future date. The principle, it is submitted, is the same where the new law came after sentence but before the hearing of the appeal.¹⁰ The reason for this rule is that the legislature has had a change of heart in respect of the particular crime. Persons being processed under the old law ought to benefit from the legislature's benignity.

Section 2. Extensions and justification of the Principle

There are three extensions of the principle of non-retrospection of criminal law. The extensions relate to new less severe criminal law; new preventive measure; and abolition of an offence, a penalty or a measure.

§1. New less severe criminal law has retrospective effect

First extension of principle. The first extension of the principle of non-retrospection relates to less severe criminal law. Section 4 of the Penal Code provides:

“(1) A new provision of criminal law shall, if less severe, apply to any offence in respect of which judgment has not been delivered before its coming into force.

(2) Where the new provision is more severe, the old law shall continue to apply to offences committed before its coming into force.”

This provision extends the second limb of section 3 to the case where a new law which enters into force anytime between the commission of an

⁹ By reason of the fact that being a temporal law its force is limited to a particular duration.

¹⁰ Section 6(a).

offence and judgment in respect of the offence does not decriminalise the offence but is less severe, for example, in that it alters the penalty incurred. The new less severe law will govern the case at hand. In other words, the new less severe law is fictionally retrospective. It is as if the new less severe law was already in existence at the time of the commission of the offence. But where the new law is more severe it does not govern the on-going case, that is, it is not retrospective.¹¹

Generally then, a less severe law, old or new, is always to be applied to any pending criminal matter. If the old less severe law is repealed before judgment then clearly, on principle, it would no longer be applicable. However, there may be a saving clause in the repealed law providing for its survival for the purposes of acts committed while it was still in force. But even in the absence of such a saving clause the general rule, as stated in section 4 (2), is that the old less severe law, though repealed, would continue to apply to the offences committed before the new severe law came into force.

When law is less severe or more severe. As between two successive laws governing the same criminal conduct the one which defines the conduct in very narrow terms is a less severe law than the one which defines it in very broad terms. If the conduct is de-criminalised the law that does so is less severe than the previous one criminalising the conduct. Similarly, if a new law redefines the same criminal conduct by discounting circumstances which the old law reckoned as aggravating factors, the new law would clearly be a less severe law. By the same token a law that gives the judge wide discretion to mitigate penalty or to impose a much reduced sentence would be less severe than a law that denies the judge such a sentencing discretion.

In *Oscar Ituka v The People* (1968)¹² the appellant, a treasurer in the Kumba Council at Mbonge, altered a payment voucher to read 115000 francs by adding the figure '1' before 15000 and the words 'one hundred' before the letters 'fifteen thousand' and stole the 100000 francs difference. He also made the related false entry in his cash book. He was charged before the Buea High Court, presided by Gordon J, under three counts, one of fraudulent false accounting, another of forgery, and a third, under s.1 of Federal Law No. 62-10 of 9 November 1962, of stealing public funds. He was found guilty on all three counts and was sentenced to 2 years' imprisonment on each of counts 1 and 2 and to 10 years' imprisonment on count three, all sentences to run concurrently. In sentencing the appellant on 1 February 1966 the trial judge took into consideration certain mitigating circumstances which existed in his

¹¹ Section 3.

¹² (1968-1970) UYLR 7.

favour and gave him 10 years instead of the minimum sentence of 15 years with hard labour as prescribed by the 1962 law. On appeal the West Cameroon Court of Appeal (Cotran, CJ, Kesiro and Dervish, JJ) confirmed the conviction on all three counts, the sentence on counts 1 and 2 but reduced the sentence on count 3 from 10 to 5 years' imprisonment. In so reducing the sentence on the third count the Court of Appeal said,

“In sentencing the appellant on the 1st February 1966 the learned trial Judge took into consideration certain mitigating circumstances which existed in his favour and acting under the provisions of Art. 1(b) sentenced him to 10 years' imprisonment only. However, we are of opinion that his sentence was too harsh on the accused and we reduce it to one of imprisonment for 5 years. Our authority for doing so is the well known authoritative case of *Attorney-General v Mbeng Mbeng* which was decided by the Federal Court of Justice in 1967. It was held in that case that the provisions contained in Art. 1 of the Law 62-10 of 9 November 1962, which limit the effect of mitigating circumstances were repealed by Art. 2 of Law 65-LF-24 of 12th November 1965 which introduced the Penal Code, and by Art. 90-93 of the Penal Code itself. Consequently, since the appellant was convicted and sentenced after the 12th of November 1965 the courts were not bound by the limiting effects of Art. 1 of Law 62-10 and could, where mitigating circumstances existed, act under Art. 90-93 of the Penal Code which had come in force before the appellant was convicted and sentenced. And we believe that had the judgment in *Mbeng Mbeng* preceded the appellant's case, the learned trial Judge would have imposed a lesser term of imprisonment on the appellant. It must be noted that by virtue of section 184(1)(c) of the Penal Code the maximum sentence of which appellant would be liable is now 10 years imprisonment and by virtue of subsection (2) of the same section where mitigating circumstances exist the imprisonment may be reduced to 2 years.”¹³

This case illustrates the point that a less severe law¹⁴ applies to a case that has not become final. However, it is submitted that while the Court of Appeal acted within the law when it further reduced the appellant's sentence, its reasoning in arriving at that correct decision was faulty. Law No. 65-LF-24 of

¹³ At page 8; the case *Attorney-General of the Federal Court of Justice (Full Bench) v Thomas Mbeng Mbeng* is reported in (1968) WCLR 83.

¹⁴ In the instant case the law is less severe in that it prescribes a less severe punishment and empowers the judge to admit mitigating circumstances entailing a reduction of the prescribed penalty.

12th November 1965 did not come into force until 1st October 1966, eight months after the judgment of Gordon J. At the time of his decision, Gordon J was still legally bound by the provisions of s.1 of Law No. 62-10 of 9 November 1962. He could not have invoked the provisions of sections 90-93 of the Penal Code for the simple reason that Book I of the Code, containing those sections, was not yet in force. Nor could he have applied *Mbeng Mbeng* since that case was only decided in the following year. The Court of Appeal disposed of the appeal in September 1968, two years after the coming into force of Book I of the Penal Code. It was therefore correct to have invoked sections 90-93 in favour of the appellant. Those sections repealed by necessary implication s.1 of Law No. 62-10 of 9th November 1962. However, the primary authority for the Court of Appeal's decision are the provisions contained in sections 4(1) (retrospection of less severe criminal law) and 90-93 (mitigating factors) of the Penal Code. Arguably, *Mbeng Mbeng* has value as persuasive and not binding authority since the doctrine of binding precedent hardly exists in this country.

Often, a new law is more severe than the earlier one. A law would be more severe if it reclassifies as a felony the same conduct earlier classified as a misdemeanour under a previous law. A law would also be more severe if it reclassifies as a misdemeanour the same conduct previously classified as a simple offence. A new law would obviously also be more severe if it imposes for the same offence a penalty higher than did the previous law.

§2. New preventive measure has retrospective

Second extension of the principle. The second extension of the principle of non-retrospection relates to new preventive measure. By section 5, "A new law authorizing a preventive measure shall apply to any case where judgment has not become final before its coming into force."

Preventive measures are provided in sections 36 to 45 of the Penal Code. These measures are: banned occupation (i.e., disqualification from exercising a profession or trade), preventive confinement, post-penal supervision and assistance (i.e., supervising and assisting ex-convicts), confinement of lunatics and addicts in a health institution, and confiscation. The trial court pronounces any of these measures when it sentences the convicted person. But the measures take effect only after the convicted person has serviced out the principal penalty. Where the convicted person is given a suspended sentence the measure pronounced against him takes effect immediately. The purpose of imposing preventive measures on a convicted person, be it noted,

is not to punish the offender, but to ensure the future protection of the public and even the offender himself.

Naturally, therefore, a new law authorising a preventive measure is a less severe law and so is applicable to any act in respect of which judgment has not yet been passed. If judgment has already been passed in respect of a particular matter a new law authorising a preventive measure will not be applicable. The reason is that when a court passes judgment in a case it becomes *functus officio*; it cannot resuscitate the case for the purpose of pronouncing a preventive measure in connection therewith.

§3. Effect of abolition of an offence

The third extension of the principle of non-retrospection relates to the abolition of an offence, a penalty or a measure. Section 6 of the Penal Code provides as follows:

“Any penalty or preventive measure shall cease to be enforceable:

(a) from the moment when the act or omission in respect of which it was imposed is no longer an offence;

(b) on the abolition of the penalty or measure generally.”

One effect of the second limb of the principle of non-retrospection enunciated in section 3 is that prosecution is barred in respect of an act which is no longer an offence at the time of judgment: a person may not be arrested and charged for that act; a person already in detention for that act must immediately be released; any on-going trial of a person for that act ceases forthwith and the person set free.

Section 6 contemplates the situation where after a person has been convicted and sentenced a new law de-criminalises the act for which the person was convicted and sentenced, or abolishes the penalty or measure generally. The section ordains that in any such case the punishment ceases to be enforceable: penalty can no longer be enforced; preventive measure can no longer be executed. The law abolishing a penalty or measure may however contain a saving clause providing, by way of transitional provisions, for the enforcement of penalties or measures already pronounced by any court of competent jurisdiction.

Section 6 is grounded in justice. The reasoning of the law is that it would be highly unjust that one offender, because his trial was expeditious, should stay in prison, while another who committed the same offence on the same day, but whose prosecution has been less swift, should remain a free man. Principles of fairness and of equality before the law demand that both persons

be treated alike. Furthermore, if a penalty or measure is no longer authorised by law it stands to reason that it cannot be enforced as there would be no legal warrant for doing so.

§4. Justification for the principle

The justification for the principle of non-retrospection is that retrospective laws are highly injurious, oppressive and unjust. The principle is thus seen as a bulwark against legislative and judicial arbitrariness and even governmental tyranny and oppression. It is seen as consistent with the need to preserve and guarantee the rights, liberties and security of the individual. If the law were to be applied retrospectively, the implication would be that a person can do something today which is not prohibited by law but by subsequent legislation the particular act in question is made punishable by the new law. If this were allowed no one would be secure in their person, liberty or property. There would be created in the mind of the citizen the constant fear of being punished for today's conduct by some future law. The effect would be to put into the hands of government a powerful tool of oppression and terror. Retrospective legislation is thus in a sense a violation of the rule of law. An aspect of the rule of law is that a person's conduct must be governed by law. And to the extent that the rule of law is a critical aspect of good governance, *ex post facto* legislation is inconsistent with the principle of democracy.

The object of the criminal law is to give adequate warning on conduct that is criminal and in that way prevent future criminal conduct. The law cannot therefore be applied to any act that was not criminal at the time it was done because in that case the preventative value of the criminal law would be nil. Furthermore, penalty is the punishment for disobedience. There cannot be disobedience unless there is an injunction preceding the act which amounts to disobedience. One cannot speak of directing conduct today by rules that will be enacted tomorrow. Lon Fuller makes the pointed observation that retrospective criminal legislation amounts to "the brutal absurdity of commanding a man today to do something yesterday."¹⁵

¹⁵ Fuller L., *The Morality of Law*, Yale University Press, 1969, p. 59.

The Principle of Territoriality: Application of the Criminal Law in Space

Every state is entitled to assert its sovereignty against another state on an equal footing. This is a major implication of the principle of sovereign equality of states. Furthermore, every state is master (i.e. has jurisdiction) over its territory and population. Territorial jurisdiction is at the heart of the principle of state sovereignty. It is a concept reflective of one aspect of the sovereignty exercisable by a state within its territory. It is the basis of the application of the series of legal rights that a state possesses. It is the foundation of the capacity of the state to prescribe legislation applicable to all persons, property, acts or events within its territory; jurisdiction to enforce its appropriately prescribed legislation; and jurisdiction to adjudicate the rights of particular parties in its courts or other agencies.¹ As an incidence of their responsibility for the conduct of law and the maintenance of good order within the state, the competent state authorities prosecute offences committed within the territory of the state.

Jurisdiction may be based on other grounds, but it is primarily territorial. States frequently assert jurisdiction to try an offender on the fact that the offence was committed within its territory, i.e. on the basis of the territorial principle. The principle provides a number of practical advantages. The territory where the crime is committed provides the most genuine and effective link between the crime and the state concerned. The commission of the crime within the territory of a state necessarily involves the interest of that state. The state on whose territory the offence was committed is the most convenient forum (*forum conveniens*) as the state best able to try the offender. That state is the best placed and best able to try the offender because the evidence is most freely available there. Moreover, that state has the greatest interest in the punishment of the offender and it has the greatest facilities for ascertaining the truth.

The territorial principle is not the exclusive principle on which a state may assert jurisdiction to try an offender. Jurisdiction may also be asserted on the bases of nationality, national interest, or universality. These various principles

¹ These three types of jurisdictional power are denoted respectively as prescriptive jurisdiction, enforcement jurisdiction and adjudicatory jurisdiction. Shaw MN, *International Law*, Cambridge University Press, Cambridge, 1997, p. 452.

are independent and cumulative and often interweave in practice. They are reasonable bases for the exercise of jurisdiction and are reflected in a number of provisions in the Penal Code. The wrongful exercise of jurisdiction by a state would be tantamount to excess of jurisdiction. In principle wrongful exercise of jurisdiction would give rise to state responsibility in international law even in the absence of an intention to harm another state. Such *ultra vires* acts may justify diplomatic protests.²

Section 1. Territorial Jurisdiction

Section 7(2) of the Penal Code provides rather compendiously that the territory of this country “include[s] its territorial waters and the airspace above the said territory [i.e. land area or *terra firma*] and waters, and also vessels and aircrafts registered in [this country].” This terse but comprehensive provision calls for some elaboration.

Territory is a geographical portion of the earth. Territorial jurisdiction is therefore authority asserted by the state in virtue of the spatial area within which it effectively and exclusively exercises jurisdiction.³ Territory does not consist only of the land area (*terra firma*). It also includes internal waters⁴, the airspace above internal waters and the land area, and vessels and aircrafts flying the state’s flag, i.e. having the nationality of the particular state.

§1. The territorial principle – general rule

The criminal courts of this country have jurisdictional competence to try any offence to which the criminal law of the state is applicable.⁵ The criminal

² Brownlie I, *Principles of Public International Law*, Oxford University Press, Oxford, 2003, p. 312.

³ State territory has always been delimited because of the need to avoid conflicts of authority between neighbouring states. The usual way of doing so is by treaty. The bases of delimitation are artificial (conventional) and natural borders. For decolonised states the basis of delimitation is *utis possidetis*, that is, the principle involving the preservation of the demarcation under the colonial entities that were constituted as states. Anyangwe C, ‘African Border Disputes and their Settlement by International Judicial Process,’ *South African Yearbook of International Law*, vol. 28, 2003, p.29.

⁴ These are also described as national or internal waters. Internal waters include such parts of the sea as are not either the high seas or relevant zones or the territorial sea, and are accordingly classed as appertaining to the land territory of the coastal state. They comprise: lakes and rivers included in the land territory of a state, waters on the landward side of baselines from which the breadth of the territorial sea is calculated, land-locked seas, historical bays, ports, and canals. See Article 5(1) of the 1958 Convention on the Territorial Sea; article 8(1) of the 1982 Law of the Sea Convention; MN Shaw, *International Law*, Cambridge University Press, 1997, p.393; Brownlie I, *Principles of Public International Law*, Oxford University Press, 2003, p.116.

⁵ Section 12.

law of this state applies “to any act done or omitted within” this country’s territory.⁶ As a general rule then, the criminal courts of the state will assert jurisdiction to try an offence where all the ingredients have taken place wholly within the state territory. But this rule is more extensive than it appears. It encompasses not only crimes committed entirely on the territory of the state but also crimes in which only part of the offence has occurred in the state, i.e. where only some of the ingredients of the offence are localised within the state.⁷

The classic but fanciful example is that of a person who fires a weapon (a gun, a missile, or artillery) across a frontier killing somebody. This is one situation in which concurrent jurisdiction arises. The state where the gun was fired (place of commencement of the offence) may claim jurisdiction to try the offender on the basis of the subjective territorial principle. That state would assume what Glanville Williams calls ‘initiator jurisdiction’⁸, on the reasoning that the criminal conduct started or was initiated within its territory. But the state where the injury actually occurred (place where the offence was completed or consummated) may equally claim jurisdiction on the basis of the objective territorial principle. This would be the exercise of ‘terminatory jurisdiction’ (Glanville Williams) as the place where the proscribed result took place

A specific application of this doctrine, regarding inchoate offences, is reflected in section 9 of the Penal Code which provides:

“The criminal law of the Republic shall apply:

(a) to any act or omission within its territory constituting abetment, conspiracy or attempt with a view to an offence without that territory: Provided that the said offence be also punishable by the law of the place of commission;

(b) to any act or omission without its territory with a view to an offence within that territory.”

The courts in this country have ‘terminatory’ jurisdiction under section 9(b) and it matters not that the act contemplated to be done in this country would not be a crime by the law of the place of the inchoate offence. Courts have initiator jurisdiction under section 9(a) but they would assume jurisdiction only if the contemplated substantive act to be committed abroad is indeed an offence by the foreign law, just like the requirement that the

⁶ Section 7(1).

⁷ Sections 8(a) and 9.

⁸ Williams G, *Textbook of Criminal Law*, Stevens & Sons, London, 1978, p. 40.

conduct here must be an inchoate offence by the law of this country. If the contemplated substantive act is not an offence by the foreign law the courts of this country cannot assume jurisdiction even if the conduct here amounts to an inchoate offence. Similarly, the courts here will not assume jurisdiction if a conduct that is an inchoate offence abroad is done with a view to commit in this country an act that is not an offence by the law of this country.

More than one state may have legitimate interests in prescribing, adjudicating or enforcing with respect to the same events or persons. In that case the state's jurisdiction is not exclusive but concurrent with that of other states. The exercise of such concurrent jurisdiction either may give rise to conflicts requiring resolution or may simply require coordination. How this is done in each case is normally determined by principles of international comity, and even on the basis of state discretion.

As a matter of comity and discretion, a state has jurisdiction over aliens and over criminals within its territory⁹. It also has jurisdiction over any ship in its seaport, any aircraft on its airport, and any ship or aircraft of its nationality, i.e. ships and aircrafts registered in the state and so flying its flag¹⁰. Again it has jurisdiction to try any crime commenced in its territory though completed in another state¹¹. Further still it has jurisdiction to try a crime which though

⁹ In the case of *Dabbach Fouzi alias Mekoudé Marcus*, jurisdiction was asserted by the Yaoundé Tribunal de Grande Instance to try a foreigner of Syrian origin resident and working in Yaoundé and who hired killers to eliminate a person he considered a threat to his job. See, 'Un immigré aurait recruté des tueurs pour éliminer un contrôleur de travaux', *Cameroon Tribute*, 24 March 1984, p. 6. In *Parpalakis and Obarcopos*, the same court sentenced two Greeks to death by shooting for aggravated theft (they used two revolvers in stealing the sum of 16 million francs). See, 'Condamnés à mort deux Grecs interjettent appel', *Cameroon Tribune*, 8 April 1983, p. 6. However, in *Cutting's Case* (1887) U.S. For. Rel., p.751 the US Supreme Court decided that a state cannot prosecute a non-national who is merely temporarily within its territory for an alleged offence against its laws committed abroad on a prior occasion. This case is widely cited in international law for America's rejection of the passive personality principle. Cutting, an editor and citizen of the US was arrested, prosecuted, convicted and jailed in Mexico for a libel published in the US to the detriment of a Mexican. The US Government demanded his release arguing that the Mexican courts might not, without violating international law, try a citizen of the US for an offence committed and consummated in his own country, merely because the person offended happens to be a Mexican, and that the alleged libel was never circulated in Mexico so as to constitute the crime of defamation under Mexican law or that any copies of the defamatory publication were actually found in Mexico.

¹⁰ This is known as the quasi-territorial jurisdiction principle.

¹¹ This is the subjective territorial principle. The principle creates jurisdiction over crimes commenced within the state but completed or consummated abroad. In *R. v. Nekunda* [(1989) 39 A Crim R 5 (NSW CA)], D sent poisoned chocolates from Australia to West Germany with intent to cause bodily harm. Australia assumed jurisdiction to try the case.

commenced in another state either produced harmful effects or was consummated on state territory¹².

A state is entitled to object if another state asserts jurisdiction over a matter, criminal or civil, which is wholly connected to its sovereign domain. This is so because of the principle of state sovereignty, entailing as it does, limits imposed by international law on the jurisdictional competence of the state. It is a basic international law rule that a state cannot exercise jurisdictional competence outside its territory except by virtue of a permissive rule derived from international law. This doctrine, known as the territorial principle or the principle of territoriality, is however not exclusive. The general rule that municipal criminal law is territorial admits of a number of exceptions which, in this country, are stated in sections 7(2), 8(2), 10(1)(2), and 11 of the Penal Code and are discussed below.

§2. The territorial principle – exceptions

Derogations to the territorial principle relate to two cases. First, there are cases where jurisdictional competence may not be exercised by the state even though a crime may have been committed within its territory. Second, there are cases where the state asserts jurisdiction even though the offence may have been committed outside its territory.

Derogation from the exercise of local criminal jurisdiction. As a general rule any offence in a foreign vessel though on the territorial waters, or a foreign aircraft though in the airspace, of the state, committed against another member of the same crew escapes the jurisdictional competence of the territorial sovereign.¹³ Even though the ship or aircraft is within the territorial waters or airspace of another state the flag state continues to have

¹² This is the objective territorial principle. An illustration that comes to mind is that of trans-boundary environmental pollution by transnational corporations. The classical illustration, however, is the firing of a gun across the frontier causing a homicide on the territory of the forum. Another example is afforded by the *S.S. Lotus Case (France v. Turkey)* [(1927) PCIJ, ser. A, No. 10. In that case France objected to Turkey's trial of a French naval lieutenant for criminal negligence that caused a collision between his ship and a Turkish collier, the *Boz-Kourt*, on the high seas, killing several Turkish citizens. In its ruling under jurisdiction the Permanent Court of International Justice concluded that Turkey was free to act unless a customary prohibition against the exercise of jurisdiction could be found. In the instant case there was none, the Court deciding that Turkey had not acted in conflict with the principles of international law by exercising criminal jurisdiction. Shaw, op. cit. p.461, notes that the Lotus principle as regards collision at sea has been overturned by article 11(1) of the High Seas Convention 1958, which emphasised that only the flag state or the state of which the alleged offender was a national has jurisdiction over sailors regarding incidents occurring on the high seas.

¹³ Proviso to section 7(2).

responsibility for and jurisdiction over the ship or aircraft. Because of the special character of the internal economy of the ship or aircraft the law of the flag state ordinarily continues to govern the internal affairs of the ship or aircraft. It is therefore not usual for the territorial sovereign to intervene and enforce the local jurisdiction. Furthermore, in general, the local jurisdiction does not apply to acts taking place on board a ship before the vessel entered internal waters.

It is also the case that ships in innocent passage escape the jurisdiction of the coastal state. Customary international law recognises the right of peaceful or innocent passage (including stopping and anchoring) through the territorial sea of the coastal state. Warships and non-commercial government vessels also escape the jurisdictional competence of the coastal state because they enjoy complete immunity from local jurisdiction.

In this regard, the Code subjects aircrafts and ships under the same jurisdictional rules. The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963, provides that the state of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board. It further provides that each Contracting State shall take such steps as may be necessary to establish its jurisdiction as the state of registration over offences committed on board aircraft registered in such state. The Convention does not exclude any criminal jurisdiction exercised in accordance with national law.¹⁴

In certain circumstances, however, the territorial sovereign may assert jurisdiction. Vessels exercising the right of innocent passage are subject to the penal laws and regulations of the coastal state because a ship in foreign port or foreign internal waters is automatically subject to the local jurisdiction (unless there is an express agreement to the contrary). However, the penal laws and regulations must be consistent with international law and the local sovereign may take action with regard only to breaches of local law and not to breaches of rules set by the law of the flag state.

When a foreign ship enters a port it is, ordinarily, subject to the local jurisdiction because a temporary allegiance is owed to the territorial sovereign. A case of concurrent jurisdiction then arises since both the flag state and the coastal state may exercise jurisdiction in respect of activities associated with the ship for breaches of their respective laws. In *R. v. Anderson*,¹⁵ the UK Court of Appeal declared that an American national who had committed manslaughter on board a British vessel in French internal waters was subject to the jurisdiction of the British courts, even though he was also within the

¹⁴ Article 3.

¹⁵ (1868) 1 Cox's Criminal Cases 198.

sovereignty of French justice (and American justice by reason of his nationality), and thus could be correctly convicted under English law.

It is clear from a reading of the proviso to section 7(2) of the Penal Code that a member of the crew of a foreign vessel or aircraft may be tried for an offence committed against another member of the same crew on board that vessel or aircraft, within the territorial waters or airspace of this country, if the assistance of the local authorities shall have been invoked or public order shall have been disturbed. Although the proviso is concerned with only crimes as between crew members *inter se*, what is there captured is not dissimilar from what is contained in the Convention on the Territorial Sea, 1958 and in the Convention on the Law of the Sea, 1982. Under both treaties criminal jurisdiction may be exercised by the coastal state in respect of private vessels provided certain considerations are met, that is to say: if the consequences of a crime committed in the vessel extend to the coastal state; if it is necessary for the suppression of illicit traffic in narcotics; if the assistance of local authorities has been requested by the captain of the vessel or by the consul of the country whose flag the vessel is flying; or if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea.¹⁶

In *Wildenbus*' case¹⁷ the US Supreme Court held that the American courts had jurisdiction to try a crew member of a Belgian vessel for the murder of another Belgian national (the Belgian courts also had jurisdiction on account of the Belgian nationality of the murderer and of the deceased), when the ship was docked in the port of Jersey City in New York, because the murder *ipso facto* disturbed the public peace on shore. Similarly, in the *Tempest*¹⁸ the French *Cour de Cassation* accepted the over-riding nature of the local jurisdiction and held that homicide of a fellow crew-member, causing disorder on shore, compromised the peace of the port.

The domestic law on the criminal jurisdiction of the territorial sovereign, as stated in the proviso to section 7(2) of the Penal Code, is the same regarding vessels and aircrafts. Again, this is not dissimilar from what is contained in article 4 of the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963. It is there provided that a Contracting State that is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board. However, such a state may do so in any of the following cases: where the offence has effect on the territory of such state; where the

¹⁶ See, Article 19, Convention on the Territorial Sea, 1958; Article 27, Law of the Sea Convention, 1982.

¹⁷ (1887), 120 US 1.

¹⁸ 1859 Dalloz I. 88

offence has been committed by or against a national or permanent resident of such state; where the offence is against the security of such state; where the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such state; and where the exercise of jurisdiction is necessary to ensure the observance of any obligation of such state under a multilateral international agreement.

The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, and the Montreal Convention for the Suppression of Unlawful Acts against Civil Aviation, 1971, create duties for state parties to punish the seizure of aircraft in flight and to exercise jurisdiction in specific conditions, such as, when the offence is committed on board an aircraft registered in the contracting state.¹⁹

Extraterritorial jurisdiction over aliens. Section 8(b) of the Penal Code confers jurisdiction to the municipal courts in respect of any offence against the security of the state or of counterfeiting ‘the Great Seal’ or the currency money of the state, *wherever committed*. The words in italics mean that this country would exercise extraterritorial criminal jurisdiction irrespective of whether the treasonable or counterfeiting offence was committed wholly within the territory of another state or within an area that is a *res nullius* or a *res communis*. This is an extensive extraterritorial jurisdiction. The phrase ‘extraterritorial jurisdiction’ refers to jurisdiction over an offence which has no connection at all with the territory of this country.

However, where the extraterritorial commission of any of these offences is by a foreigner jurisdiction will be asserted by this country only if the offender has been arrested in this country. It follows that an alien who commits abroad any of these offences (state security offence, counterfeiting currency or the Great Seal) cannot be abducted from there and brought here to face trial. Nor may he, in the absence of an extradition treaty or a practice as to rendition that allows for extradition or for surrender in cases of this nature, be sent to this country to face trial for any of those offences committed abroad.

Section 2. Personal Jurisdiction

Personal jurisdiction is authority asserted by a state over persons (individuals) on grounds of allegiance (active nationality principle, passive nationality principle) or on grounds of protection (protective or security principle) or on grounds of international comity and solidarity (universality

¹⁹ Brownlie, op. cit., p.318.

principle). The exercise of this head of jurisdiction is however limited especially by the restrictive principle of foreign immunities.

§1. Jurisdiction over nationals wherever they may be

In principle, it is for the state to determine who its nationals are. No one disputes the right of a state to subject its citizens abroad to the operation of its own criminal laws, if it sees fit to do so. This concerns simply the citizen and his own government. This does not mean that its criminal laws apply to other countries and to what takes place wholly within such countries.²⁰ A state thus has jurisdiction over its nationals²¹ even when they are physically outside the country's frontiers. The reason for this is that a national owes allegiance to his own country no matter where he is located. Another reason why the state asserts jurisdiction over its nationals even when they are abroad is that each state has both responsibility to other nations for the conduct of its nationals and an interest in their welfare while they are abroad. Jurisdiction on the basis of nationality may be assumed on the principle of active nationality or on the principle of passive nationality (or personality).

Active nationality principle. This principle focuses on the citizen, the perpetrator of the offence. It permits a state to assume jurisdiction to proceed against an offender abroad who is its citizen. This is so because citizenship or nationality is a mark of allegiance, an aspect of sovereignty, and is generally recognised as a basis for jurisdiction over extraterritorial acts. The active nationality principle is mirrored in section 10(1) of the Penal Code which provides that the criminal law of this country "shall apply to any act or omission abroad by a citizen."

The application of this principle is extended to any foreigner ordinarily resident in this country. An alien permanently resident in a country is one whose stay in that country presents some degree of permanence and stability. Section 10(1) further provides that the criminal law of this country "shall apply to any act or omission abroad by a ... resident." The justification for this extension is probably that permanent residence supports an *ad hoc* notion of

²⁰ Cf. the dissenting opinion of Judge Moore in the *Lotus Case*.

²¹ In respect of individuals, nationals are persons born within the territory (*jus soli*), or one or both of whose parents was born in the territory (*jus sanguinis*) or who have *naturalised*. In respect of juridical persons, a corporation or a company has the nationality of the state whose law has formally created it, which regulates its constitution and under whose law it can be wound up or dissolved: *Barcelona Traction Light & Power Company Ltd (Belgium v. Spain)*, ICJ Rep. 1970, p.3. In respect of vessels, a ship has the nationality of the state where the ship is registered and thus whose flag it flies: *S.S. Lotus*. In respect of aircrafts and spacecrafts, these have the nationality of their country of registration.

allegiance. Long term employment and the payment of income tax are dependable connections that may be relied on as evidence of allegiance owed by the alien to the state in which he resides and thus justifying the assumption of jurisdiction by the state. The very concept of a permanent resident as propounded here excludes from the mischief of section 10 the tourist, the passing traveller and the occasional visitor on business or pleasure or the person in the country on a temporary resident permit.

The territorial and nationality principles, and the incidence of dual nationality, create parallel jurisdictions and possible double jeopardy. An example of concurrence of jurisdiction is the jurisdiction of the state of nationality of the accused and the jurisdiction of the state of commission of the offence. Another example is the relation between the territorial sovereign and the flag state in the matter of jurisdiction over private vessels in ports or other internal waters. The rule is that the law of the flag state depends on the nationality of the ship (the state of registration of the ship) and the flag state has responsibility for and jurisdiction over the ship. When a foreign ship enters a port, “a temporary allegiance is owed to the territorial sovereign and so a case of concurrent jurisdiction arises, since both the flag state and the local sovereign may exercise jurisdiction in respect of activities associated with the ship for breaches of their respective laws.”²²

Many states therefore place limitations on the nationality principle. For example, the application of the principle is often confined to serious crimes. In terms of section 10(1) the criminal law of this country will apply to an act or omission abroad by a citizen or an alien ordinarily resident in this country only if the conduct is an offence by the law both of this country and that of the place of commission. And it will also apply only if the conduct though an offence in the place of commission amounts to what the law of this country defines as a felony or a misdemeanour. Assuming that the preceding two conditions are satisfied, the court of this country in asserting jurisdiction, in trying and convicting the offender, cannot pass a sentence more severe than the maximum sentence provided by the foreign law for the impugned conduct.

A citizen or permanent resident of this country who commits abroad a misdemeanour against a private person may be tried in this country only at the instance of the prosecuting authority either upon complaint by the private party or upon request to the government of this country by the government of the place of commission of the misdemeanour.²³

²² Brownlie, *op. cit.* p.315.

²³ Section 10(2), Penal Code.

Passive nationality principle. This principle focuses on the national who is victim of an offence. It thus permits a state to assert jurisdiction over acts abroad by aliens in which the victim of the offence is its national.²⁴ An example would be a terrorist act abroad that injures a national of the forum. The state whose national was injured by the terrorist act abroad would assert jurisdiction over the act and prosecute the terrorist (if arrested in the state or extradited or surrendered to it). In fact, municipal and international instruments provide for the possibility of states asserting jurisdiction on the basis of the passive nationality principle.

In one American case, *US v. Yunis* (No. 2)²⁵, a Lebanese citizen was arrested by US agents on a fishing boat in international waters and charged with taking hostages and with piracy of a Royal Jordanian Airlines civilian aircraft in 1985. The only connection between the hijacking and the US was the fact that several American nationals were on that flight. The US District Court of Columbia accepted that both the universality principle and the passive nationality principle provided an appropriate basis for jurisdiction in the case. The court relied on the passive nationality principle, stating that although the latter principle was the most controversial of the jurisdictional principles in international law, the international community recognised its legitimacy.

But this was a somewhat broader application of the principle because the crime did not take place in another state but in international airspace which is a *res communis*, and the suspect was arrested in international waters, which is also a *res communis*. On the other hand the American agents could not have arrested Yunis in the territory of another state as that would have been an infringement of the territorial sovereignty of that state. Whatever controversy surrounds the passive nationality principle, in recent years the international community has accepted it in the spheres of terrorism and other internationally condemned crimes.

Certain applications of the passive nationality principle fall under the principles of protection and universality. In the *Cutting Case*, for example, the Mexican court exercised jurisdiction on the basis of the passive nationality principle since the defamation in the US was injurious to a Mexican citizen.

The Penal Code contains no provision by which this country may, by permission of municipal law, assert extraterritorial criminal jurisdiction on the basis of the passive nationality principle. This is a gap in the municipal law.

²⁴ *Lotus case*.

²⁵ 681 F Supp 896 (1988).

§2. The protective principle

This principle permits a state to assume jurisdiction over aliens in respect of criminal acts done abroad against its security, integrity or vital economic interests.²⁶ The principle rests on the protection of concrete interests. Section 8(b) of the Penal Code provides that the criminal law of this country shall apply

“to any offence against the security of the State or of counterfeiting the Great Seal or the currency money of the State wherever committed: Provided that no foreigner may be tried for an offence to which the law of the Republic applies solely by virtue of this subsection unless he has been arrested within the territory of the Republic or has been extradited to it.”

The subsection envisages offences against the internal and external security of the state²⁷, counterfeiting the currency of the country²⁸ and counterfeiting the ‘Great Seal’²⁹. The place of commission abroad is immaterial, whether it is in the territory of another state or in an area that is a *res nullius* or *res communis*.

The courts of this country will also assert jurisdiction over aliens for any act or omission abroad constituting abetment, conspiracy or attempt with a view to the commission of any offence within this country.³⁰ The place of commission abroad of any of these inchoate crimes is immaterial. It may be in the territory of another state. It may be in an area that is *res nullius* or *res communis*. It does not matter. Extraterritorial criminal jurisdiction will still be asserted to try and punish the foreigner offender.

The basis for asserting jurisdiction in this particular case of an inchoate crime with a view to a substantive offence in this country is the ‘terminatory theory’. The inchoate offence and the ultimate crime that is envisaged constitute one criminal enterprise which begins abroad (with the inchoate offence) and is meant to terminate or end in this country (with the consummation of the substantive crime). One might say the courts of this country assert jurisdiction on the analogy of a result-crime where the act is done abroad and the criminal effect (the proscribed result) is produced in this country, the crime being taken to have been committed in this country even though the elements of the offence are split between the place abroad and this country.

²⁶ See the following foreign cases: *Joyce v. DPP* (1946) AC 347; *Rocha et al v. US*, 288 F.2d 545 (1961); *US v. Rodriguez*, 182 F. Supp. 479 (1960).

²⁷ These offences are provided for in sections 102-121, PC.

²⁸ Section 211, PC.

²⁹ Section 201, PC.

³⁰ Section 9(b), PC.

It is evident that in the case under discussion the offender will be tried only if he has been arrested in or extradited to this country. He cannot be tried *in absentia*.

§3. The universality principle

“The criminal law of the Republic shall apply to piracy, traffic in persons, the slave trade, and traffic in narcotics committed within or without the territory of the Republic: Provided that no foreigner may be tried for such an offence committed abroad unless he has been arrested in the Republic and has not been extradited, and except at the instance of the authority controlling prosecution.”³¹

Piracy is both a crime under international law and under municipal law³². Traffic in persons, the slave trade, traffic in narcotics, and, one may add, terrorism, aircraft hijacking and hostage-taking, elicit international concern similar to the concern about piracy. That is why these crimes are often considered as attracting universal jurisdiction.

“A considerable number of states have adopted, usually with limitations, a principle allowing jurisdiction over acts of non-nationals where the circumstances, including the nature of the crime, justify the repression of some types of crimes as a matter of international public policy. Instances are common crimes, such as murder, where the state in which the offence occurred has refused extradition and is unwilling to try the case itself, and also crimes by stateless persons in areas not subject to the jurisdiction of any state, i.e. a *res nullius* or *res communis*.”³³

Universal jurisdiction thus refers to those crimes for which international law permits any state to proceed against the perpetrator. But it would seem that jurisdiction is also universal with regard to *delicta juris gentium* (piracy, slave-trade, traffic in narcotics, counterfeiting), war crimes, crimes against humanity, traffic in women and children, and the crime of genocide. International law permits the repression of these crimes because these are offences which affect the legitimate interest of the international community as a whole. However, this does not necessarily mean that all these offences are crimes under international law (counterfeiting, for example, is not). What affects the interest

³¹ Section 11, PC.

³² Sections 292-300, Merchant Shipping Code.

³³ Brownlie I, *Principles of Public International Law*, Oxford University Press, 2003, p. 303.

of the international community as a whole is one thing; and what customary international law or treaty prohibits as a crime is a separate thing altogether.

Crimes over which jurisdiction is asserted on the basis of the universality principle are dealt with according to the principle *aut punire, aut dedire*. This means the offenders are either to be punished by the state on whose territory they are found or to be surrendered (or extradited) to the state which is competent and desirous of exercising jurisdiction over them.

§4. Crimes under international law

These are the most serious crimes of international concern. They are: war crimes, crimes against humanity, genocide and aggression.³⁴ Every state has jurisdiction under customary international law to exercise extraterritorial criminal jurisdiction in respect of international crimes. Crimes under international law are such regardless of whether they are also crimes under municipal law (generally they are). Anyone who commits any of these offences may be punished by any state which obtains custody of him.

The act being an international crime, the perpetrator is thereby considered a subject of international law. The matter is not therefore one essentially within the domestic jurisdiction of a state and so jurisdiction over it may be exercised by any state or by an appropriate competent international body. This is often expressed as an acceptance of the principle of universality. Brownlie argues that this is not strictly correct because,

“what is punished is the breach of international law; and the case is thus different from the punishment, under national law, of acts in respect of which international law gives a liberty to all states to punish, but does not itself declare criminal.”³⁵

In his dissenting judgment in the *Pinochet Case (No.3)*, Lord Millett said,

“In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal

³⁴ See, Hague Convention 1907; Geneva Conventions of 1949 and the 1977 Additional Protocols thereto; and the Rome Statute of the International Criminal Court 1998. These offences, with the exception of aggression which still defies a generally acceptable definition, are elaborately defined in the Rome Statute.

³⁵ Brownlie, *op. cit.* p. 303.

order. Isolated offences, even if committed by public officials, would not justify these criteria.”³⁶

It is increasingly recognised by international law jurists that the principle of universal jurisdiction is an attribute of the existence of crimes under international law. Therefore, provided that certain standards of legality are observed, municipal courts are at liberty to exercise jurisdiction in respect of international crimes. This is recognised by the Rome Statute of the International Criminal Court (ICC) which gives precedence to national courts. The jurisdiction of the ICC is only complementary (principle of complementarity) to that of municipal courts. It is stated in the preamble and in Article 1 of the Statute that the ICC is a permanent institution “complementary to national criminal jurisdictions.” What this means is that states parties to the Statute are required to utilise their own courts in the first instance, and the ICC may intervene only when national courts are unable or unwilling to act.

§5. Limitations on the exercise of personal jurisdiction

The general principles on which criminal jurisdiction for crimes committed wholly abroad, or partly abroad and partly in this country, or having an incidence in this country, may be asserted by this country have been considered. There will now be considered the reverse situation, i.e. those cases in which criminal jurisdiction cannot be exercised by this country as it normally would because of certain special factors.

Lack of means. A state has factual limitations to its ability to claim jurisdiction. Quite apart from limitations imposed by international law flowing from the principles of sovereignty, sovereign equality of states and international comity, a state does not generally have the means at its disposal to enforce its laws in the territory of another state. Municipal courts are therefore not anxious to make decisions the enforcement of which would be problematic because the matter falls within the jurisdictional competence of another state.

Sovereign and diplomatic immunities. The special factors just referred to relate to sovereign and diplomatic immunities from the jurisdiction of the territorial state. This immunity from jurisdiction (whether as regards the state itself or as regard its diplomatic representatives) is grounded on the

³⁶ [1999] 2 WLR 825 at 911, cited in Brownlie, p. 304; see also *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex. P. Pinochet Ugarte* (No. 3) [2000] 1 AC 147.

international law requirement to respect the territorial integrity and political independence of other states; for, the concept of jurisdiction, as earlier noted, revolves around the principles of state sovereignty, equality, non-interference, and domestic jurisdiction.³⁷

The territorial state's exercise of jurisdiction over persons is therefore limited by the restrictive principle of foreign immunities: state immunity, diplomatic and consular immunities, and, much narrowly, immunity concede to diplomatic representatives of international organisations.

By section 2(1) of the Penal Code,

“This Code and every provision of criminal law shall be subject to the rules of international law and to all treaties duly promulgated and published.”

This provision is generally construed to mean that only diplomatic representatives of states are immune from the criminal jurisdiction of this country. But this is a very restrictive interpretation. Apart from diplomatic immunities there is also sovereign immunity. Sovereign immunity is grounded in customary international law and it is equally an exception to the general rule of territorial jurisdiction. Besides, municipal statutes in many countries proclaim sovereign immunity as a general principle, subject to exceptions such as foreign state liability for injury, death, loss of property etc. occurring in the territorial state.³⁸ Furthermore, international organisations, whether universal, such as the United Nations, or regional, such as the African Union or the European Union or the Organisation of American States, may conclude with Member States conventions on privileges and immunities providing that officials of the organisation performing their functions in Member States are beyond the reach of municipal criminal law. The enjoyment of immunity in all these cases is of course subject to express or implied waiver.

The establishment of diplomatic relations with other states is a mere option. International law does not grant a right to diplomatic relations. Diplomatic relations exist by virtue of mutual consent. It is only by express licence that agents of one state enter the territory of another and there act in their official capacity. Therefore, no state is legally compelled to enter into

³⁷ Shaw MN, *International Law*, p. 491.

³⁸ In *Letelier v. Republic of Chile*, 488 F. Supp. 665 (1980), this exception in a US statute on sovereign immunity was used to indict in that country the secret service of Chile with regard to the murder of a former foreign minister in Washington DC.

diplomatic relations if it does not wish to. When a state enters into diplomatic relations it *ipso facto* accepts the principles of diplomatic immunities, governed in part by customary international law, in part by municipal statute and in part by treaty, the most significant of which is the Vienna Convention on Diplomatic Relations 1961. This treaty emphasises the functional necessity of diplomatic privileges and immunities for the effective conduct of international relations. In *Prosecutor v Blaskic* (1997), the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia advanced the following rationale for functional immunity:

“State officials acting in their official capacity ... are mere instruments of a state and their official actions can only be attributed to the State. They cannot be the subject of sanctions and penalties for conduct that is not private but undertaken on behalf of a state. In other words, state officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called ‘functional immunity’.”³⁹

Another rationale put forward is that

“the immunity of state officials in foreign courts prevents circumvention of the immunity of the state through proceedings brought against those acting on behalf of the state. In this sense, this immunity operates as a jurisdictional or procedural bar and prevents courts from indirectly exercising control over acts of the foreign state through proceedings against the official who carried out the act.”⁴⁰

Functional immunity is subject-matter immunity, that is to say, immunity that attaches to the conduct performed by the relevant official of the sending state within his official capacity as such and therefore attaches to only conduct carried out on behalf of the state. It points to the character of the diplomatic mission as representing its state and to its official acts as the basis of that immunity. Personal immunity, on the other hand, is immunity which provides the person of the relevant official of the sending state complete immunity while he carries out important representative functions. It thus subsists only

³⁹ ICTY, IT-95-14-AR108bis at para 38.

⁴⁰ Akande D, ‘International Law Immunities and the International Criminal Court,’ (2004) 98(3) *American Journal of International Law* 407-433 at 413.

for as long as the person holds the office in question and it can be waived by the sending state.

As far as international criminal law is concerned functional immunity cannot relieve even a head of state or government of criminal responsibility for acts condemned as criminal under international law. The reason why functional immunity does not protect certain international crimes is that international law does not protect the same acts that it prohibits and condemns. The same is true in much of Domestic jurisprudence on immunity functional immunity is also clear that that immunity does not protect certain international crimes from prosecution. The *locus classicus* is the *Pinochet* case, where the House of Lords held that General Pinochet of Argentina could not rely on functional immunity in order to avoid being extradited for allegations of torture.⁴¹

The matter is much nuanced when it comes to the relevance of personal immunity in the prosecution of international crimes. The dominant view seems to be that that immunity does not apply to individuals in proceedings before international courts. Much depends on whether the founding instrument confers jurisdiction on the court or tribunal in question. The International Criminal Tribunal for the former Yugoslavia indicted Slobodan Milosevic while he was still a sitting head of state. Similarly, the hybrid Special Court for Sierra Leone indicted Charles Taylor a former Liberian head of state for alleged crimes committed while he was in office. The Court held that “the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.”⁴² In a similar vein, the ICJ held in *DRC v Belgium* that an “incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.”⁴³

Under article 29 of the Vienna Convention on Diplomatic Relations the person of a diplomatic agent is inviolable. Such a person may not be arrested or detained. Furthermore, article 31(1), reflecting the accepted position under customary international law, provides that a “diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state.” This also applies to “members of the family of a diplomatic agent forming part of his

⁴¹ *R v Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte* (No. 3) [1999] 3 All ER 97, HL.

⁴² SCSL, *Prosecutor v Charles Taylor*, Decision on Immunity from Jurisdiction, SCSL-03-01-1 (May 31, 2004) at para. 52.

⁴³ *DRC v Belgium*. Arrest Warrant of 11 April 2000: Crimes against Humanity: ‘Immunity versus Impunity’ Judgment, ICJ Reports (2000) 3 at para. 61.

household ... if they are not nationals of the receiving state.”⁴⁴ The enjoyment of immunities and privileges is nevertheless accompanied by an obligation on the diplomatic representative to respect the law of the host country. In the face of offences alleged to have been committed by a diplomat (or a member of his household), the host state’s only remedy, and this is an extreme measure, is to declare the diplomat *persona non grata*.⁴⁵

Person immunity of the diplomatic agent from jurisdiction may be waived, and expressly so, by the sending state because waiver is for the benefit of the sending state and does not belong to the individual concerned. But this is unusual especially in criminal cases, though it would seem that in some countries waiver in the face of criminal charges is often sought and sometimes granted. Personal immunity may be waived because it is temporary and is lost when the individual ceases to be a diplomatic agent. Functional immunity, on the other hand, is permanent because it is an incidence of the principle of sovereign equality of states, and for that reason cannot be waived.

Consular officers enjoy only a limited immunity from the criminal jurisdiction of the host state. Article 41 of the Vienna Convention on Consular Relations 1963 provides that consular staff may not be arrested or detained except in the case of a grave crime and following a decision of the competent judicial authority. If a member of the consular staff commits a ‘grave crime’ and the competent judicial authorities decide to press charges the officer must appear before the court and answer the charges.

With regard to the immunities of international organisations the position under customary international law is not altogether clear. The matter is usually dealt with by means of a treaty granting immunities and privileges to the international institution sited in the territory of the host state. In fact, the constituent instruments of international organisations frequently provide for such privileges and immunities in the territories of member states as is necessary for the proper functioning of the organisation. For example, Article 105 of the Charter of the United Nations provides that the Organisation

⁴⁴ Article 37 of the Convention.

⁴⁵ Article 9 of the Convention provides as follows: “1. The receiving state may at any time and without having to explain its decision, notify the sending state that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending state shall, as appropriate, either recall the person concerned or terminate his function with the mission. A person may be declared *persona non grata* or not acceptable before arriving in the territory of the receiving state. 2. If the sending state refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving state may refuse to recognise the person concerned as a member of the mission.”

“shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes”

and that,

“representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation.”

The General Convention on the Privileges and Immunities of the United Nations of 1946 amplifies the general provisions contained in Article 105 of the Charter. It sets out the immunities of the United Nations and its personnel.

“Representatives of Members to the principal and subsidiary organs of the United Nations ... shall, while exercising their functions ... enjoy the following privileges and immunities: (a) immunity from personal arrest or detention ...and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind ...”⁴⁶

The immunity may however be waived by the United Nations

“in any case where in the opinion of the [UN] the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.”⁴⁷

On the subject of immunities, the General Convention on Privileges and Immunities adopted by African leaders in Accra in 1965 follows closely the UN model.

A foreign sovereign who enters the territory of a state with its consent and performs acts of government within the jurisdiction of that state remains a sovereign. International law does not permit the territorial state to exercise jurisdiction over the foreign sovereign so acting. The rationale of this jurisdictional immunity rests on sovereign equality of states; the dignity of the foreign state, its organs and representatives; and on the functional need to

⁴⁶ Article IV, Section 11 of the General Convention. See Article V, Section 18 for similar provisions with regard to ‘officials of the United Nations.’

⁴⁷ Article IV, Section 14 and Article V, Section 20, General Convention.

leave them unencumbered in the pursuit of their mission. To permit the territorial state to assert jurisdiction over the visiting sovereign would be contrary to the principle of sovereign equality of states. Moreover, one sovereign is in no respect amenable to another, and may not degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another.⁴⁸

It follows that a head of state, an entrant in the territory of another state with its consent, cannot be arrested and brought before the courts of that other state. This is the principle of sovereign immunity, the focus of which is on the inability of a court to proceed against a foreign sovereign on account of his status as foreign sovereign, in a matter where it otherwise has jurisdiction. Sovereign immunity from jurisdiction is therefore based on the principle of jurisdictional immunity⁴⁹, though it may also be considered as based also on the legal doctrine of non-justiciability⁵⁰ or even the closely related but distinguishable doctrine of act of state⁵¹.

Generally speaking, the entity entitled to sovereign immunity from the criminal jurisdiction of the territorial state must be part of the apparatus of government. This is so because sovereignty is no longer regarded as appertaining to a particular individual in a state but as an abstract manifestation of the existence and power of the state. The head-of-state immunity is grounded in customary international law. Therefore, in order to assert such immunity the government official concerned must be someone recognised as head of state.⁵² Moreover, head-of-state immunity is primarily an attribute of state sovereignty, not an individual right, and that being the case the court will give full effect to the revocation by the government of a country

⁴⁸ Judgment of Chief Justice Marshall in the American case, *The Schooner Exchange v. Mc Faddon* (1812) 7 Cranch 116.

⁴⁹ The principle “asserts that in particular situations a court is prevented from exercising the jurisdiction that it possesses”; but this “does not mean exemption from the legal system of the territorial state in question.” Shaw, *International Law*, p. 493.

⁵⁰ The doctrine of non-justiciability “posits an area of international activity of states that is simply beyond the competence of the domestic tribunal in its assertion of jurisdiction, for example, that the courts would not adjudicate upon the transactions of foreign sovereign states.” Shaw, p. 492.

⁵¹ The doctrine of act of state “focuses on the nature of acts which form the basis of the proceedings, when those acts are the acts of a government performed in its relations with other governments. Such acts come exclusively within the international jurisdiction because they are acts performed by a government in its capacity as the representative of the state in the international arena. They are not merely acts of a government performed in its capacity as a government, acting merely in the interests of domestic affairs as opposed to foreign affairs of state.” O’Shea A, *International Law and Organization*, Butterworths, Durban, 1998, p. 122.

⁵² *US v. Noriega*, 746 F. Supp. 1506 (1990): the Panama President, General Noriega, was deposed as head of state following the US invasion of Panama. He was thus no longer recognised as head of state. His claim to sovereign immunity as head of state failed.

of the immunity of any official who formerly enjoyed it.⁵³ Besides, it is doubtful that the immunity of a foreign state would go as far as to render a former head of state immune as regards his private acts.⁵⁴

Section 3. Principle of exclusivity of municipal criminal law

Jurisdiction in criminal law is largely territorial. The general principle is that criminal law and criminal jurisdiction are territorial. They are confined to acts done within the state. In trying those acts to which municipal law is applicable municipal courts *prima facie* apply only municipal criminal law.⁵⁵

§1. Exclusion of foreign criminal law

The general principle on the subject is reflected in section 13 of the Penal Code. That section posits as a general rule that the courts of this country, when trying any act to which the criminal law of this country is applicable, apply only the law of this country to the exclusion of foreign law. The actual formulation of the principle is in this negative form: “no foreign criminal law shall have any effect in the courts of the Republic.”

It is a clearly established principle, arising from the doctrine of state sovereignty, that municipal criminal law is territorial. The courts of every state are only concerned with conduct which is an offence against the law of the state, i.e. they are only concerned with offences over which they have territorial jurisdiction. Therefore, to constitute an offence under the criminal law of this country the act or omission must be committed wholly⁵⁶ or partially⁵⁷ within the territory of this country.

Normally the application of this principle is easy since either all or some of the elements of an offence occur in this country or they do not occur at all. In the English case of *Treacy v. DPP*⁵⁸ the House of Lords held that a person who posts in England an unwarranted demand with menaces addressed to a person abroad can be convicted of blackmail because the offence is complete when the demand is posted, with the result that the offence is wholly committed in England. Similarly, in *El-Hakkaoui*⁵⁹ it was held that a person can be convicted of possessing a firearm with intent by means thereof to endangering life, even

⁵³ *In Re Grand Jury Proceedings, Doe No. 770*, 817 F.2d 1108 (1987).

⁵⁴ *Republic of the Philippines v. Marcos (No. 1)*, 806 F.2d 344 (1986).

⁵⁵ In certain circumstances they may be impelled to apply international criminal law, but not the domestic criminal law of a foreign state.

⁵⁶ Section 7(1).

⁵⁷ Sections 8(a), 9(a).

⁵⁸ [1971] 1 All ER 110.

⁵⁹ [1975] 2 All ER 146.

though the intention relates to endangering life abroad, if the possession of the firearm is in England. In each of these cases the court proceeded on the reasoning that the offence was committed wholly within the national territory, notwithstanding the fact that there was a foreign element in the case. But even where part of the elements of an offence take place within the state territory and others abroad, the offence will still be regarded as committed in the territory and therefore subject to the jurisdiction of the municipal courts.

The general rule is however subject to certain exceptions. These exceptions have already been discussed. But room may be found to summarise them here. First, the courts of this country are given jurisdiction over offences by a citizen or a foreigner on board a ship registered in this country and while on the high seas or in foreign port, or on board an aircraft registered in this country and while in foreign airport or in flight outside the airspace of this country. This flows from section 7(2) which defines the state's territory as including "all vessels and aircrafts registered in the Republic." Secondly, the courts of this country have extraterritorial jurisdiction over certain offences by whomsoever and wherever they may be committed.⁶⁰

§2. Effect of foreign criminal judgments

Unlike foreign civil judgments enforceable in this country, generally speaking foreign criminal judgments may not. In the absence of bilateral or multilateral treaties providing for the execution in each state's territory of criminal judgments delivered by the courts of the contracting states, a foreign criminal judgment has, in principle, no binding force in this country. While the courts of this country will not allow such a judgment to be enforced in this country it does not necessarily follow that the judgment may not be taken into account by a court proceeding with someone convicted and sentenced by a foreign court.

A foreign criminal judgment has effect within this country, provided that it satisfies two conditions. First, the conduct in respect of which the foreign judgment was passed must amount to a felony or a misdemeanour as defined by the law of this country. Secondly, the court of this country must satisfy itself that the foreign judgment is regular, final and in conformity with the public policy of this country. Section 14 of the Penal Code provides:

"No foreign criminal judgment against any person shall have effect within the territory of the Republic unless:

⁶⁰ Sections 8(b), 9(b), 10 and 11.

(a) The act or omission in question is defined by the law of the Republic as a felony or misdemeanour under the ordinary law; and

(b) The regularity of the judgment, its finality, and its conformity with the public policy of the Republic shall have been ascertained by the Court trying the person in question or by the Court of Appeal of his residence at the instance of the authority controlling prosecution.”

Thus, provided the stipulated conditions are met the courts of this country may allow the enforcement of a foreign criminal judgment in this country. If the conditions are not met the foreign criminal judgment although valid by the country of its rendition will have no effect in this country and must be ignored by the domestic courts.

If the national court is satisfied that the foreign criminal judgment passes the test in section 14, the said judgment is validated, so to speak, and it may then have effect on the case at hand before the national court. First, during the arraignment, the foreign criminal judgment is a good basis for the special pleas in bar known as *autrefois acquit* and *autrefois convict*. The pleas are respectively that the accused has been previously tried (in this case by the foreign court as it appears in the foreign judgment) and acquitted or previously tried and convicted for the very offence for which he is now charged in the trial or for any other offence founded on the same facts as the offence charged. Where the plea is that of *autrefois convict* (previous conviction) the accused must satisfy the court that he did not evade enforcement of, but actually served out, the sentence that was passed abroad in consequence of his conviction (or that the sentence was commuted or remitted, or that enforcement of the sentence was barred by lapse of time). Where the plea is that of *autrefois acquit* (previous acquittal) the accused must satisfy the national court that he was expressly and rightly acquitted. It is not enough to show that he was ‘discharged’ or that the charge was ‘dismissed’ or that there was a preliminary inquiring which ended in a finding of no *prima facie* case⁶¹.

Secondly, at the level of sentencing the national court takes the foreign criminal judgment into consideration as a previous conviction for the following purposes: aggravation of sentence, preventive confinement, suspending of sentence, revocation of suspension of sentence, revocation of release on licence, rehabilitation, and amnesty.

⁶¹ The Buea High Court (Niger-Thomas, J) held in *The People v William Nkemasong & Boniface Nkemasong* (1971-1973) UYLR 157 that a finding of a ‘no prima facie case’ at the end of a preliminary inquiry does not operate to bar any subsequent charge in respect of the same facts.

These principles are captured in section 15 of the Penal Code.

“Section 15. – Effect of Foreign Judgment.

Such judgment shall:

(a) Be taken into consideration as a previous conviction for the purposes of aggravation of sentence, of preventive confinement, of suspension of sentence or revocation of such suspension, of revocation of release on licence, of rehabilitation, and of amnesty; and

(b) Found a good plea in the courts of the Republic of *autrefois convict* or *acquitt*: Provided that in the case of conviction the accused shall have served his sentence or satisfied it by prescription or pardon.”

§3. Execution of foreign judgments

Where a foreign criminal judgment passed against a citizen or permanent resident of this country has not been enforced elsewhere it may be enforced in this country, provided the trial court or the Court of Appeal has ascertained that the foreign judgment passes the test set out in section 14 of the Penal Code. The judgment will however not be enforced in this country if enforcement is barred either by release on licence, pardon, amnesty, or prescription.

A court order is required for the enforcement of any foreign judgment. The trial court or the Appeal Court makes an enforcement order. In making the order the court may, in a fit case, impose any preventive measures that the offence in question attracts by virtue of the law of this country.

“Section 16. – Execution of Foreign Judgment.

(1) Any such judgment as is contemplated by section 14 and has been ascertained to conform to that section, if passed against a citizen or against a resident, and not enforced elsewhere, shall be capable of enforcement within the territory of the Republic, unless enforcement shall have been barred by release on licence, pardon, amnesty or prescription.

(2) Enforcement shall require the order of the court contemplated by section 14, which may also, in a fit case, impose the preventive measures attracted according to the law of the Republic by the offence in question.”

The Principle of Territoriality: Mutual Co-operation between States in Criminal Matters

Technological advances in the contemporary world continue to facilitate international travel, communication, and movement of persons and goods. This form of globalisation is a welcome development. But it has also brought in its wake increased international criminality in the form of transnational crime and international terrorism. Crime is increasing in scope, intensity and sophistication. Criminals have developed the ability to commit crimes in several countries within a relatively short period of time and escape the jurisdiction of any one state. Multinational criminal syndicates have expanded the range of their operations from drugs and arms trafficking to money laundering, human trafficking and computer or cyber crimes. For criminals, it is as if the world is flat and borderless.

“Over the past few years, the Internet has grown explosively. ... [Billions] of people now communicate, shop, pay bills, do business, [network socially through e-mail, ‘Whatsapp’, Facebook, twitter, etc.] and even meet with their doctors online. As the Internet has expanded so has its misuse. So-called cybercriminals roam the electronic environment, exploiting jurisdictions which have which have not developed domestic controls on cybercrime, to commit crimes such as unauthorized access or ‘hacking’, fraud, computer vandalism or sabotage, drug trafficking, distributing child pornography, and cyber stalking. Computer criminals are as diverse as the offences they commit. They can be as young as ten years of age. They may be students, terrorists or members of organized crime. For economic crimes, such as fraud or information-theft, the biggest category is in-house employees, who commit 90% of such crime, according to the 1997 United Nations Manual on the Prevention and Control of Computer-Related Crime. Cybercriminals can zoom across international borders unobstructed and undetected, hide behind countless ‘links’ or simply vanish, leaving no paper trail. They can conceal the evidence or proceeds of their crimes in ‘data havens’ – countries where their acts are not considered crimes. They can also exploit nations lacking in the legislation, resources or expertise to track them down, simply by routing their communications through such nations. Hacking into unauthorized sites with the help of sophisticated techniques or software to

bypass or defeat security measures has become a hugely popular cyber offence. Once they have access, offenders commit crimes against economic or privacy interests, sabotage systems, or simply erase or distort data. Other cybercriminals may sabotage computers to gain economic advantage over competitors or threaten to do so for extortion purposes. Offenders use so-called ‘worms’ or ‘viruses’ to attack system operations or to erase or distort data. E-mail and internet ‘chat-rooms’ are used by offenders to target vulnerable users. Paedophiles have used the internet to identify, and in some cases, abduct, children, and e-mail is used by cyber stalkers, who send harassing or threatening messages, often to women. In addition to raiding the websites of others, criminals may open their own to defraud customers or to sell forbidden goods or services, such as weapons, drugs, unprescribed or unregulated medicines or pornography. As computer criminals have taken advantage of new opportunities created by computer networks, many countries have developed new laws and technical expertise to control the problem. Legislation has been used to create new offences to deal with entirely new phenomena, such as hacking. Legislation dealing with more traditional offences, such as fraud and vandalism or sabotage, has been modernized to ensure that it will apply in the new electronic environment. Legal powers to investigate crime have also had to be extended or modified to deal with the new situations which arise. Despite these efforts, major challenges still face governments and law enforcement agencies. These include the fact that much of computer crime can be committed across borders or in several countries at once, which creates a need for modernized framework for legal assistance and cooperation between the countries involved, and their experts and agencies. In addition to the development of laws and expertise, law enforcement also face faces problems inherent in the new technologies themselves. A key problem is the fact that criminals can easily destroy evidence by changing, erasing or moving it. Data may also be encrypted into a format which cannot be read even if it is seized. Legal experts now agree that cooperation at the international level is crucial to fight the global effects of cybercrime effectively.”¹

More recently, new crimes and new classes of victims have emerged.

“Offences such as large-scale consumer fraud, inflated prices, environmental pollution and rampant corruption victimize large groups of

¹ United Nations Office for Drug Control and Crime Prevention, *UPDATE*, Special Edition, April 2000, p. 12

people, rather than individuals. Trafficking in illicit drugs and many forms of racketeering have been called ‘victimless crimes’. Even when the victims are clearly identifiable, such as those caught up in trafficking for sexual exploitation and forced labour, a new set of rights may be required for their protection, because of organized crime involvement. Victims of people-smuggling rings may feel particularly threatened, since they may be treated as illegal prostitutes or immigrants and denied protection or services. Victims may be afraid to report crimes against them for fear of deportation. In some countries, legal authorities may give key witnesses immunity. But that may not be enough for victims or witnesses of organized crime who fear retaliation if they testify. Some nations have set up witness protection programmes, but these are costly. Experimenting with less expensive methods, such as anonymous testimony, is needed. Victims of organized crimes should benefit from the ... Convention against Transnational Organized Crime and its protocols on trafficking in illicit firearms, migrants and human beings, which include measures to protect witnesses and victims.”²

The United Nations Convention against Transnational Organized Crime which entered into force in September 2003 thus requires states parties to the treaty to criminalise serious crime committed by organised groups, including corruption and corporate involvement with criminal groups. The Convention also requires states parties to crack down on money-laundering by cutting off the channelling of funds through ‘safe’ accounts and licit businesses. It further requires states parties to thwart criminal suspects fleeing prosecution in one country to freedom in another by facilitating and speeding up extraditions. Again the Convention requires states parties to protect witnesses who testify against criminal groups and encourage them to do so through granting immunity from prosecution in certain cases and by permitting video testimony. States parties to the Convention are furthermore required to upgrade law enforcers’ investigative skills in monitoring the flow of contraband and criminal proceeds, and in using up-to-date techniques, including electronic surveillance and undercover operations. Finally, the Convention requires states parties to prevent organised crime by keeping criminal groups out of legitimate businesses and contract bidding, and promote codes of conduct, particularly for lawyers, notaries, tax consultants and accountants.

² Ibid, p. 11.

These new crimes, mushrooming at an alarming rate, constitute a threat to the safety of citizens around the world. They pose a threat especially to vulnerable groups such as the poor whose human misery is exploited for huge criminal profits, women and children used for forced labour or sex slavery, and ‘conflict merchants’ involved in illegal firearms trade which has become a source of enormous wealth. They constitute a serious impediment to the social and economic development of third world countries. Quite early then, the United Nations established the Commission on Crime Prevention and Criminal Justice (headquarters in Vienna, Austria) as a functional body of the Economic and Social Council. The Commission is charged with formulating policies and coordinating activities in drug control, crime prevention and criminal justice. States themselves have been prompted to work out forms of co-operate for the suppression of criminal activities.

Two broad areas of concerted action may be identified: co-operation among various national police services in the fight against international crime and mutual assistance in criminal matters; and the establishment of a network of extradition treaties relative to fugitive offenders.

Section1. Interpol and mutual assistance between states in criminal matters

As a general rule, a state cannot take measures on the territory of another state by way of enforcement of national laws without the consent of the latter.

“Persons may not be arrested, documents may not be served, police or tax investigations may not be mounted, and orders for production of documents may not be executed, on the territory of another state, except under the terms of a treaty or other consent given.”³

Until recently, and as an incidence of the principles of state sovereignty and of territoriality of criminal law, the general practice of states was to decline enforcement of the criminal law of a foreign state. But in the face of the menace of international crime the old attitude of non-cooperation began to crumble, giving way to police forces working together through the International Criminal Police Organisation (Interpol) and schemes on mutual assistance in criminal matters.

³ Brownlie, op. cit., p. 306.

§1. Interpol⁴

The International Criminal Police Organization, Interpol, is an intergovernmental organization that facilitates international police cooperation⁵. Established in 1923 with the name International Criminal Police Commission (ICPC), the organization in 1956 adopted Interpol as its telegraphic address and common name, and in 1989 relocated its headquarters in Lyon, France. The General Secretariat of Interpol employs a staff of over 750. The organization has an annual operating budget of about US\$80 million. The money comes mostly from annual statutory contributions by its 190 member countries. Interpol's worldwide membership⁶ makes it the second largest political organization after the United Nations in terms of international representation. Article 3 of the organization's constitution forbids it from undertaking interventions or activities of a political, military, religious, or racial character or involving itself in disputes over such matters. This provision seeks to keep Interpol as politically neutral as possible.⁷ The work of Interpol is

⁴ <https://en.wikipedia.org/wiki/Interpol> (accessed: 10 July 2015)

⁵ This organisation is not to be confused with the International Police, which takes on an active uniformed role in policing war-torn countries. The International Police is an organisation of police officers representing various countries throughout the world. These police officers are brought together to assist in the training, organisation, stabilisation of a destabilised region, or creation of indigenous police forces primarily in war-torn countries. The International Police began in the late 1980s when police officers serving with the force performed a monitoring or advising role and were thus mostly unarmed. But in the 1990s, in Haiti and Bosnia, the police officers took on a more evolved and proactive role, bearing a sidearm pistol and/or a rifle, depending on the dangers of the area in which they were assigned. The International Police sent to a war-torn country is officially referred to as a 'mission', and each 'mission' receives a specific title, such as the United Nations Mission in Kosovo, or the United Nations Transitional Authority for East Timor. Contributing countries often deploy officers who in their own country are of high rank. But while serving with the International Police their respective ranks are not taken into account; only their professional abilities and experience count. No investigator may oversee an investigation involving a member from his or her own country contingent. Usually falling under the direction of the United Nations, the International Police have served in various places of unrest, notably, Haiti, Bosnia, Croatia, Kosovo, East Timor, Liberia, Cyprus, Iraq, Sudan, and Afghanistan. Each country contributing officers has its own Contingent Command structure, but falls operationally under the United Nations usually.

⁶ The only countries that are not members of Interpol are the following Lilliputian states: Federated States of Micronesia, Kiribati, Palau, Samoa, Solomon Islands, Tuvalu, and Vanuatu.

⁷ This notwithstanding, some have criticised the agency for its role in arrests that critics contend were politically motivated. In 2013, Interpol was criticised, mainly about lack of transparency and potential conflicts of interest, over its multi-million dollar deals with such private sector bodies as FIFA, Philip Morris, and the pharmaceutical industry. Furthermore, in spite of the Article 3 prohibition, on 25 July 2014, Interpol, at the request of Russia, placed Dmytro Yarosh, the nationalist paramilitary leader of Ukraine, on Interpol's international wanted list. On 12 January 2015, Interpol also placed on its wanted list Viktor Yanukovich, former President of Ukraine, suspected in mass killing of protesters against his rule.

primarily concentrated on public safety and combatting the following international crimes: child pornography, computer crime, corruption, crimes against humanity, drug trafficking, environmental crime, genocide, human trafficking, illicit drug production, illicit traffic in works of art, intellectual property crime, money laundering, organized crime, piracy, terrorism, war crimes, weapons smuggling, and white-collar crime.

Interpol is not a supra-national law enforcement agency. It has no agents who are able to make arrests. It functions as a network of criminal law enforcement agencies from different countries and as an administrative liaison among the law enforcement agencies of the member countries, providing communications and database assistance through its central headquarters⁸. Its main activity thus consists in networking and passing on information, not actual law enforcement. Its method of operation is simple. Each member country maintains a National Central Bureau (NCB) staffed by national law enforcement officers. The NCB is the designated contact point for the Interpol General Secretariat, for regional bureaux and for other member countries requiring assistance with overseas investigations and the location and apprehension of fugitives. This collaborative form of cooperation is useful in fighting international crime because language, multiplicity of security agencies, cultural and bureaucratic differences can make it difficult for police officials from different countries to work together. Take a simple case where agents of a security agency in country X track a drug trafficker to country Y. The agents may not know which security agency to contact in country Y, may not know if a particular security agency in that country has jurisdiction over some aspect of the case, and may not know who in the government of that country must be notified of the involvement of agents of country X. In such a situation, the security agency in country X to which the agents belong can contact the Interpol National Central Bureau in country Y, which would act as a liaison between country X and country Y law enforcement agencies.

Interpol maintains a large database charting unresolved crimes as well as both convicted and alleged criminals. A member country has access to specific sections of the database at any time and its police forces are encouraged to check information held by Interpol whenever a major crime is committed. The rationale behind this is that terrorists, human traffickers, drug traffickers and similar criminals have international ties, and so it is likely that crimes will extend beyond political boundaries. Interpol's databases at the headquarters

⁸ In addition to its General Secretariat headquarters in Lyon, Interpol maintains seven regional bureaux: Buenos Aires in Argentina, San Salvador in El Salvador, Yaoundé in Cameroun, Abidjan in Côte d'Ivoire, Nairobi in Kenya, Harare in Zimbabwe, and Bangkok in Thailand.

assist law enforcement in fighting international crime. National agencies do have their own crime databases. But the information in those databases rarely extends to data obtainable beyond national borders. Interpol's databases track criminals and crime trends around the world by means of collecting fingerprints and face photos, lists of wanted persons, DNA (deoxyribonucleic acid) samples and travel documents.⁹ These and other data are analysed by officials at Interpol headquarters. Information on crime trends is then released to member countries.¹⁰ In the event of an international disaster, terrorist attack or assassination, Interpol sends an Incident Response Team (IRT), offering a range of expertise and database access to assist with victim identification, suspect identification and the dissemination of information to law enforcement agencies of other countries. In addition, at the request of local authorities, IRTs can act as a central command and logistics operation to coordinate other law enforcement agencies involved in a case. Interpol has Command and Coordination Centres which offer a 24/7 point of contact for national police forces seeking urgent information or facing a crisis. It has gone a step further by opening a Special Representative Office to the United Nations in New York in 2004 and to the European Union in Brussels in 2009. In 2015 it also opened in Singapore a facility known as the Interpol Global Complex for Innovation (IGCI). The Complex is Interpol's research and development facility, and a place of cooperation on digital crimes investigations. Interpol began issuing its own travel documents in 2009 with hopes that countries would remove visa requirements for individuals travelling for Interpol business, thereby improving response times.

§2. Mutual assistance in criminal matters

Today, unlike in yester-years, mutual assistance schemes and mutual assistance treaties have become a regular feature of international cooperation in criminal matters. Various schemes¹¹ for mutual assistance in criminal

⁹ The organization's lost and stolen travel document database alone contains more than 12 million records.

¹⁰ In 2013, Interpol issued 13,637 notices, of which 8,857 were Red Notices. There are currently about 53,000 valid notices in circulation. An encrypted internet-based worldwide communications network allows Interpol agents and member countries to contact each other at any time. Known as I-24/7, the network offers constant access to Interpol's databases. While the National Central Bureaux are the primary access sites to the network, some member countries have expanded it to key areas such as airports and border access points. Member countries can also access each other's criminal databases via the I-24/7 system.

¹¹ A 'scheme' is merely an agreed set of recommendations for legislative implementation by the governments involved in the scheme. It is not a treaty and therefore does not create binding legal obligations. But it has the advantage of being a very flexible device which permits of relatively easy amendment and the development of procedures in the light of experience.

matters usually provide for a wide range of types of assistance, including identifying and locating persons, assistance in matters of forensics and pathology, serving documents, examining witnesses, search and seizure, obtaining evidence, facilitating the personal appearance of witnesses, effecting a temporary transfer of a person in custody to appear as a witness, obtaining production of judicial or official records, and tracing, seizing and forfeiting the proceeds of criminal activities.

Generally speaking, a scheme of mutual assistance seeks to increase the level and scope of assistance to be rendered between two governments in criminal matters. Such a scheme increases and strengthens the level of existing forms of cooperation and operates in this way. A state participating in the scheme and that wishes to obtain assistance from another participating state initiates a request for assistance through its law enforcement agency or public prosecution authority or competent judicial authority. A designated central authority (Minister for Justice or Minister for External Affairs) in the requesting state transmits the request for assistance to the corresponding central authority in the requested state. The requested state will give assistance in response to a request made in respect of a criminal matter arising in the requesting state.

To establish that a criminal matter arises in its territory the requesting state need only certify that proceedings have been instituted in a court of competent jurisdiction in that country or that there is reasonable cause to believe that an offence in respect of which such proceedings could be instituted has been committed.¹²

Section 2. Extradition

A person who has committed an offence within the territory of a state and fled abroad could be tried, convicted and sentenced in his absence. But trial *in absentia* is a very unsatisfactory procedure. First, such a trial violates procedural guarantees for a fair trial. Secondly, any conviction and sentence by the court will be ineffectual and serve no real purpose.

The presence of the accused at the trial is therefore important. The state within whose territory the offence has been committed has to depend upon

Cf. the Commonwealth Scheme of Rendition adopted by the Commonwealth Conference in 1966.

¹² See generally, McLean D, 'Scheme of Mutual Assistance in Criminal Matters,' *Integration of the African Continent Through Law*, Edward Foakes Publishers, Lagos, 1990, p. 40; Ajibola B, 'Schemes Relating to Mutual Assistance in Criminal Matters and the Control of Criminal Activities within Africa – Nigeria's Experience,' *Integration of the African Continent Through Law*, p. 61.

the co-operation of the other state within whose territory the alleged fugitive offender has taken refuge in order to obtain surrender of the suspected or convicted criminal who is, or has fled, abroad. This co-operation, a form of international judicial assistance, rests on a procedure of request and consent, regulated by certain general principles. It is called extradition. Thus, a suspected offender or a convict who tries to evade justice by escaping to another country may be extradited by the country of refuge on request by the country where the offence was committed.

The situation under contemplation is that where a person is wanted for or has been convicted of a crime in state A, but he is physically present on the territory of state B and state B delivers him to state A pursuant to a request from state A. The practice of extradition thus enables one state to whom the request is made (the requested state) to hand over to another state making the request (the requesting state) a suspected or convicted criminal who has fled abroad and taken refuge in the territory of the requested state.

“The term extradition denotes the process whereby under treaty or upon a basis of reciprocity one state surrenders to another state at its request a person accused or convicted of a criminal offence committed against the laws of the requesting state, such requesting state being competent to try the alleged offender.”¹³

Customary international law adopts a neutral attitude on the subject of extradition. It imposes neither a duty to surrender nor a duty not to surrender. A state could choose to surrender an alleged or convicted fugitive offender to another state or it could decide not to deliver him to the state requesting his surrender. Given this state of ‘imperfect obligation’ regarding extradition the subject was at first dealt with by bilateral treaties. A general principle was soon derived from these treaties according to which without some formal authority either by treaty or by statute a fugitive offender could not be surrendered nor would his surrender be requested. In the absence of treaty the grant of extradition depended purely on reciprocity or courtesy.

International law concedes that the grant of and procedure as to extradition are most properly left to municipal law. Accordingly, today, extradition is based upon domestic law¹⁴ as well as upon bilateral or

¹³ Shearer IA, *Starke's International Law*, Butterworths, London, 1994, p. 317; cf. s.635, *Cameroun Code de Procédure Pénale*.

¹⁴ For example, Federal Cameroon Extradition Law No. 64/LF/13 of 26th June 1964 as amended by Law No. 67/LF/1 of 12 June 1967, repealed in 2005 and its provisions incorporated into the *Code de Procédure Pénale Camerounais* as Part XI (sections 635-675); the British Fugitive Offenders Act 1967.

multilateral¹⁵ treaty law. It does not exist as an obligation upon states in customary international law.¹⁶ It follows that in the absence of treaty, and with the exception of alleged crime under international law, a state cannot demand the surrender of an alleged criminal as of right. On the other hand, no general rule forbids a state from surrendering a fugitive. Such surrender is lawful unless on the facts the surrender constitutes complicity in conduct amounting to a violation of human rights or in some crime under international law (e.g. war crime, crime against humanity, genocide).

§1. General principles governing extradition

Various extradition principles may be abstracted from existing treaties and statutes on the subject. The principles fall under three broad headings, namely, there must be an extraditable person; there must be an extraditable crime; the extraditable crime must be of a particular character.

An extraditable person. There is uniformity of state practice to the effect that the requesting state may obtain the surrender of its own citizens or the nationals of a third state. However, a state does not normally surrender persons over whom it is competent to assert jurisdiction.¹⁷ Moreover, many states refuse the extradition of their own citizens who have committed offences abroad and then taken refuge within the state territory. This is usually in circumstances where the state concerned has wide powers to prosecute citizens for offences committed abroad. As between two states who observe absolute reciprocity of treatment in the matter of extradition of nationals, requests for surrender are sometimes acceded to. For example, the United Kingdom and the United States of America extradite their nationals where an extradition treaty provides for obligatory extradition of a national of the requested state.¹⁸

¹⁵ For example, the European Convention on Extradition; the General Convention of Cooperation in Matters Relating to Justice, an extradition treaty signed in 1961 by Francophone African States and usually referred to as the Convention of the African and Malagasy Union (CAMU)

¹⁶ Shaw, *International Law*, p. 482

¹⁷ Under the *Code de Procédure Pénale Camerounais*, for example, a request for extradition will be declined where the fugitive is an accomplice to a felony or misdemeanour committed abroad (s. 635), or where he is a person who while abroad was an accomplice to a felony or misdemeanour committed in Cameroun (s. 367), or where he is wanted by the requesting state as a mere witness (s. 641(4)), or where, except otherwise provided by law, the person is a Camerounese citizen (s. 644).

¹⁸ For example, in *King v. Governor of Brixton Prison* (1912) 3 KB 568, the British court granted the extradition of a British subject. In 1988 Britain surrendered some Liverpool football fans to Belgium to stand trial for causing the deaths of several football spectators during a football match in Belgium between Liverpool and a Belgian football club.

When a state refuses to surrender its citizen it does not mean that the fugitive from justice escapes prosecution by the country of his nationality. Some of the extradition treaties which recognise the principle of non-extradition of nationals of the state parties usually provide that if the requested state refuses to extradite its national, it shall itself prosecute him. Municipal courts have little difficulty in doing so because national legislation gives municipal courts jurisdiction over crimes allegedly committed abroad. To refuse to extradite a national without assuming responsibility for trying the suspect would be tantamount to abuse of power and may engage the international responsibility of the state concerned.

If a state illegally seizes a fugitive offender from the asylum state, that act may give rise to international responsibility. However, such violation of the law does not affect the validity of the subsequent exercise of jurisdiction over the abducted fugitive offender.¹⁹

An extraditable crime. States extradite for ‘serious’ or ‘grave’, and not for minor, offences. But what is a grave offence in one country may not be so in another. In an attempt to resolve this problem, at one time the ordinary practice as to extraditable crimes was to list these in a schedule appended to the extradition treaty. But this practice, which was common among Common Law countries, seems no longer fashionable. Some countries extradite for all crimes denoted as felonies and misdemeanours in both the requesting and the requested state, the threshold being a minimum sentence of two years imprisonment.²⁰

As a general rule, political, military and religious offences, however serious they may be, are not extraditable offences. Some countries will additionally not extradite where the extradition is sought for racial reasons or for reasons based on the nationality of the fugitive.²¹ What constitutes a ‘political offence’²² continues to defy a generally accepted meaning with the result that the asylum state reserves considerable discretion to decide whether a particular offence is

¹⁹ *Eichmann v. Attorney-General of Israel* (1961) 36 ILR 5; on appeal (1962) 36 ILR 277.

²⁰ Cf. *Code de Procédure Pénale Camerounais*, section 642(1)(a).

²¹ *Idem*, s. 643(1)(c).

²² The justifications for the political offence exception are the need to avoid the involvement of one state in the political conflicts of another, and the humanitarian purpose of preventing the offender from being surrendered to a jurisdiction in which there is a risk that his trial or punishment might be unfairly influenced by political considerations. See the judgment of Lord Diplock in *Tz'u-Tsai Cheng v. Governor of Pentonville Prison* [1973] AC 931 at p. 945.

political or non-political, and whether in fact extradition should be granted.²³ After some initial hesitation there is a recent trend to exclude from the meaning of ‘political crime’ those offences of violence typically committed by terrorists and also war crimes, crimes against humanity and genocide.

It appears that many states will not grant extradition if there has been a final judgment rendered against the person in the requested state in respect of the offence for which the person’s extradition is requested. This is the principle of *non bis in idem* or the principle against double jeopardy which is designed to ensure that a person is not tried for the same offence twice (i.e., cannot be twice put in peril) where he has already been convicted or acquitted. The principle against double jeopardy has the same purpose as the jurisdictional principles of *autrefois acquis* and *autrefois convict*.

Character of the crime. Even when a crime is an extraditable offence (i.e. it is not a minor, political, military or religious offence) extradition is further subject to two leading principles. First, the act in question must be punishable under the law both of the requesting and the requested state (principle of double criminality). Second, the requesting state may punish only for the offence in respect of which extradition was sought and obtained (principle of specialty).

The principle of double criminality posits as a condition of extradition that the act for which extradition is sought should be a punishable offence according to the law of both the requesting and the requested state. The principle also requires that the act should be criminal in both states at the time it was committed.

The principle of specialty ordains that the requesting state may not, except with the consent of the state of refuge, try or punish the offender for any other offence than that for which he was extradited. The person surrendered is to be tried and punished exclusively for offences for which extradition had been requested and granted. It seems, flowing from the principle of specialty, that the requesting state having secured the surrender of the fugitive offender may not re-extradite him to a third state.

§2. Extradition procedure

Requests for extradition are normally made and answered through the diplomatic channel. The actual procedure is left to municipal law. Extradition is either inward or outward. It is outward where a person who has committed

²³ By section 643(1)(a) of the *Code de Procédure Pénale Camerounais* a political offence is any felony or misdemeanour “directed against the Constitution, the sovereignty of the State and Public Authorities.”

an offence abroad takes refuge in the requested state (this country) and the requesting state (foreign state in which the offence was committed) seeks and obtains his surrender from the requested state. It is inward where it is the requesting state (this country) that seeks and obtains the surrender of a person who committed an offence in this country and took refuge in another country (the requested state). Like an arrest warrant, extradition is a means of securing the presence of the offender in the court of the requesting state.

Inward extradition. This country may apply to another state for the extradition to this country of any citizen or foreigner charged with or convicted of an offence here and who has taken refuge abroad. Extradition would be sought by this country only upon certain conditions being met. Ordinarily, only the extradition of a citizen fugitive offender may be sought. If the offender was not a citizen at the time of the commission of the offence his extradition would not be sought. Furthermore, the prosecution of the offence must not have been barred by prescription, amnesty or otherwise. Further still, the offence or any ingredient thereof must have been committed within the territory of this country. This country will seek extradition only for an offence under the ordinary law and not for a political, military or religious offence. The offence in question must be a serious crime, that is one for which the minimum sentence that may be imposed under the law of this country and that of the state of asylum is two years or more. This means that practically all offences classified in this country as misdemeanours and felonies are serious offences and may therefore be the object of an extradition request by this country.

Subject to any contrary treaty provision, an application for extradition is normally made through the diplomatic channel. The application by this country (inward extradition) is accompanied by the following documents: either a judgment of a court of competent jurisdiction imposing a custodial sentence or any instrument such as a warrant of arrest compelling the appearance of the accused before a trial court or an examining magistrate; a copy of the law applicable to the act charged; and a summary of the facts of the case. The extradition file, put together by the prosecuting authority, is sent to the Minister for Justice who verifies whether the request for extradition conforms to the law and upon being so satisfied forwards it to the Minister for External Relations. The latter forwards the application together with the relevant papers to this country's diplomatic mission in the state in which the offender is believed to have sought refuge. There, the head of this country's diplomatic mission handles the matter according to the local procedure for extradition. This depends on treaty arrangements but the principles upon

which extradition would be granted are generally speaking the same: an extraditable person, an extraditable offence, the principle of specialty, and the principle of double criminality.

There is often an arrangement for extradition whereby in cases of emergency the local authorities though not yet in possession of the extradition papers may have the fugitive arrested on application by the requesting state. The requested state will grant the request for extradition only for an offence included in the extradition treaty with this country and further only for an offence committed within this country's territory. If the application for extradition is successful, the offender cannot be made to stand trial for any offence other than for the one for which his surrender was sought; nor can he be made to stand trial for some other offence proved by the facts on which the surrender was granted. Should this country wish to try him for some other offence, he must first be given the opportunity to return to the state from which he was extradited; but if the accused remains in this country for more than thirty days after his release then he may be arrested, prosecuted and punished for any other offence he may have committed before his surrender.

Outward extradition. As in the case of inward extradition, outward extradition is made through the diplomatic channel. The request for extradition by the foreign government is channelled through the Minister for External Relations who checks the documents and then forwards the same to the Minister for Justice. After satisfying himself that the procedure is in order the Minister of Justice then directs the local prosecuting authority of the place of residence of the fugitive to arrest and take him to the nearest prison. Thereafter a lengthy process follows involving the chief prosecuting officer of the area, the court, counsel for the fugitive, if any, and the Minister for Justice. If the request for extradition is successful the Minister for Justice drafts and forwards to the state President a decree ordering the extradition. The extradition is then ordered by an instrument under the hand of the Head of State.

The application will succeed if certain conditions have been satisfied and a specific procedure followed. The conditions and procedure for outward extradition are similar to those of inward extradition. Where the extradition procedures are defective or a fugitive criminal is mistakenly surrendered to the requesting state that may give rise to international responsibility. But such violation of the law will not affect the validity of the subsequent exercise of jurisdiction over the fugitive offender.

Section 3. Rendition and asylum

A state is at liberty to accord asylum²⁴ even to an alleged fugitive offender, and it is also at liberty to refuse rendition (or extradition). Where rendition (or extradition) begins asylum stops.

§1. Rendition

Rendition is a generic term. It covers instances where an offender may be returned to a state to be tried there, whether the crime alleged to have been committed is an extraditable offence or not. The return may be either under *ad hoc* special arrangements, or on the basis of reciprocity (in the absence or even presence of an extradition treaty).²⁵

If a person is deported or refused asylum that act may have the effect of a rendition, even though the deporting state or the state of purported entry may consider that it is not of this nature. Such deportation or refusal of asylum may in fact amount to use of immigration or expulsive powers as a substitute for extradition, i.e. a disguised form of non-treaty extradition. The conduct may be illegal either on the ground of breach of the human right to lawful procedure, or as constituting an improper exercise of the administrative discretion to exclude aliens.

§2. Asylum

Asylum may be territorial²⁶ or extra-territorial²⁷ and it involves shelter and a degree of active protection by the state of asylum. Every state has the full

²⁴ There may be an obligation under human rights law to grant asylum. Article 12(3) of the African Charter on Human and Peoples' Rights provides: "Every individual shall have the right, when persecuted, to seek and *obtain* asylum in other countries in accordance with the laws of those countries and international conventions."

²⁵ It was held in *R v. Governor of Brixton Prison, ex p. Soblen* [1963] 2 QB 243, that deportation is allowable under the British aliens legislation even though the alleged offence is non-extraditable, and even if there be a request for rendition.

²⁶ This is internal asylum, i.e. asylum granted by a state on its territory. It may be 'political asylum', (for persons escaping political persecution in their own country), 'refugee asylum' (for persons with a well-founded fear of persecution in their own country), or 'general asylum' (for persons who have fled from their country to seek economic betterment, but do not have the status of immigrants).

²⁷ That is, 'diplomatic asylum' or asylum granted in the premises of legation, consulates and international institutions to persons fleeing from the authority of the territorial state. This is exceptional (because there is no general right to grant such asylum) and must be established in each case. In the *Asylum Case* (1950) ICJ 266 the International Court of Justice held that the granting of extra-territorial asylum is derogation from the sovereignty of the territorial state insofar as that state is required to acquiesce in fugitives from its authorities enjoying protection from apprehension. Exceptionally, extra-territorial asylum may be granted where there is a binding local custom, long recognised, that such diplomatic asylum is permissible. It

right to grant territorial asylum. The power to do so is an incidence of territorial sovereignty itself. There is now the principle of '*non-refoulement*' (i.e., non-return or non-rejection at the frontier) and the grant of 'temporary refuge'. The principle of *non-refoulement* and grant of temporary refuge enable a state to admit persons fleeing from their own countries for a limited stay, pending resettlement, without any binding or moral commitment to grant 'asylum'.

may also be granted under a special treaty between the territorial state and the state which is represented by the legation concerned. It may furthermore be granted as a temporary measure to individuals physically in danger from mob disorder or mob rule or where the fugitive is in peril because of extreme political corruption in the local state.

The Mental Elements of an Offence: Intentional Fault Element

The contemporary idea of criminal responsibility rests on the concepts of mental guilt and outward conduct. Mental guilt is founded on two ideas. The first idea is that every man has the free will and power to choose between right (good) and wrong (evil). This in itself presupposes that man has the capacity to distinguish between good and evil and has the ability to control his behaviour. The second idea concerning mental guilt is that when man opts to do wrong, he does so consciously, that is, intentionally, deliberately, or knowingly. We say he is intentionally at fault. His mind is at fault. It is guilty. Now, when he goes a step further and operationalizes, as it were, his guilty mind by actually engaging in the wrongful conduct conceived in his mind, we say he has acted unlawfully. This implies that he was capable of appreciating the wrongfulness of his conduct and that he acted in accordance with that appreciation. The conjoining of the above two separate elements of responsibility, mental fault (*mens rea*) and unlawful conduct (*actus reus*), results in a crime.

Generally then, an accused person is criminally responsible only when he does an act or causes a state of affairs prohibited by the criminal law and does so with mental awareness amounting to what may be called 'guilty mind'. This cardinal principle of the criminal law is captured by the well known maxim, '*actus non facit reum, nisi mens sit rea*'. The Latinism means an act does not make a person legally guilty unless his mind is legally guilty. In order to secure a conviction the prosecution must prove that the accused did the prohibited conduct with the requisite state of mind. The maxim, classic in the criminal law of Common Law jurisdictions, stresses two basic requirements of criminal law, *actus reus* and *mens rea*, and serves as a useful framework in the analysis of the definition of specific offences.

Mens rea. However, though a useful analytical framework, the distinction between *actus reus* and *mens rea* tends to obscure rather than to clarify analysis of the ingredients of an offence. To begin with, the expression *mens rea* suggests that guilty mind (or criminal mind) always arises, expressly or impliedly, in every definition of an offence. This is misleading because the mental elements of different crimes differ widely. In some crimes *mens rea* is not even required for criminal liability. This is generally the case in regulatory, strict liability and vicarious liability offences. Secondly, the term *actus reus* refers

to criminal ‘act’. This could also be misleading because sometimes no act is in fact required on the part of the accused in order to attract criminal liability. In some offences an omission to act may suffice while in still other cases the mere happening of an event may suffice. Sometimes also the definition of an offence may specify surrounding circumstances such as time or place or status, which are essential to render the act criminal. Again, the definition of an offence may require a consequence to result from the act for there to be criminal liability.

Since these Latin terms are apt to mislead, many academic writers are wary of using the ‘*actus reus*’ and ‘*mens rea*’ dichotomy as a framework for analysing the ingredients of an offence. They do not follow the ‘*actus reus*’-‘*mens rea*’ distinction which most English authors tend to make.¹ Some prefer to distinguish between ‘the external elements’ and ‘the fault elements’ (intention, negligence, recklessness, knowledge) of an offence²; between ‘conduct’ and ‘culpability’³; between ‘the physical elements’ and ‘the mental elements’⁴; between ‘the prohibited conduct’ and ‘intention and other fault elements’; and, between ‘unlawful conduct’ and ‘fault’⁵. These various distinctions are based on the fact that the definition of any particular offence nearly always consists of two sorts of elements, physical and mental. These terms themselves are mere approximations and are used as mere terms of convenience. Before proceeding to discuss the notion of the mental element in crime under the Penal Code, a preliminary issue relating to the relevance of the English criminal law concept of *mens rea* to that Code may be disposed of at this juncture.

Section 1. Relevance of English doctrine of *mens rea* under the Penal Code

In English criminal law there is a general doctrine known as the doctrine of *mens rea*. The law in this country has a historical link to the law of England. The body of law received in this country from England consists of the common law of England, the doctrines of equity and the statutes of general

¹ Hall J, *General Principles of Criminal Law*, London, 1960; Wooton B, *Crime and the Criminal Law*, Sweet & Maxwell, London, 1981; Ashworth A, *Principles of Criminal Law*, Oxford University Press, Oxford, 1991; Allen MJ, *Textbook on Criminal Law*, Blackstone, London, 1991.

² Williams G, *Textbook of Criminal Law*, London, Stevens & Sons, 1978.

³ Snyman CR, *Criminal Law*, Durban, Butterworths, 1995.

⁴ Okonkwo and Naish, *Criminal Law in Nigeria*, Sweet & Maxwell, London, 1980.

⁵ Kemp G et al., *Criminal Law in South Africa*, Oxford University Press South Africa, Cape Town, 2012. But this distinction, as the authors themselves concede at pages 30 and 181, is merely the *actus reus* – *mens rea* distinction using different terminologies.

application in force in England as of 1900. Most of the important offences in this country are by and large codified in the Penal Code. The source of a large number of those offences is the Nigerian Criminal Code which was applicable in the Southern Cameroons and which Criminal Code was itself substantially influenced by English criminal law. What then is the relevance of the English criminal law doctrine of *mens rea* to the criminal law of this country? There are two possible contending views: one view is that the doctrine ceased to be relevant when the Code was enacted; the other view is that the doctrine continues to be relevant.

§1. The doctrine ceased to be irrelevant

One view is to deny the continuing relevance of that doctrine to the criminal law of this country. The argument on which that denial may be founded would run like this. The English doctrine of *mens rea* lost its position in the criminal law of this country as a source on the requirement of the mental element in crime. There is therefore no need to import *mens rea* into the criminal law of this country. The provisions of the Code are so comprehensive as to obviate any need to have recourse to the doctrine of *mens rea*. Before codification in 1965, it was necessary to have recourse to that concept since the applicable criminal law at the time was the Nigerian Criminal Code itself influenced by English law. In 1966 the Legislature laid down in clear terms in section 74 of the Penal Code the test in determining the criminal responsibility of a person charged with an offence. It is by reference to the test prescribed by the language of that section that the courts are required to decide the issue of criminal responsibility. Irrespective of our historical link to the law of England the doctrine of *mens rea* has been ousted by section 74 and is not part of the criminal law of this country. This view is seductive. But it does not stand informed inquiry and must be rejected as too simplistic and narrow.

§2. The doctrine continues to be relevant

The opposing view is that the doctrine of *mens rea* still holds some relevance in this country for a number of reasons. First, members of the judiciary, state prosecuting officers, lawyers in private practice, and law students need to understand that doctrine as a matter of general legal education, the foundation of which in this country is still substantially based on the common law system. Secondly, the doctrine of *mens rea* could usefully serve to illuminate and clarify aspects of the law on criminal responsibility. This is the more so as local case-law in this area of criminal law is sparse and inadequate and, on some topics, completely inexistent. English decisions expounding the doctrine of *mens rea* remain relevant and are persuasive

authority in explicating concepts such as intention, negligence, recklessness, and so on, and how these operate in the context of the mental element in crime. Further, reference may be made to *mens rea* and to English cases based thereon as illustrative material to illuminate certain legal points in the law of criminal responsibility. Thirdly, it would seem that section 74(2) simply defines and clothes in legislative form the concept of *mens rea*, as was understood by the drafters of the Code. One of those who took part in the drafting of the Penal Code states:

“Part III of Book I [of the Penal Code] opens with a definition of criminal responsibility, dealing separately first with *the meaning of mens rea* and secondly with the need for it ... French statute is as silent as English on both these subjects, but most of what we provided can be found in the Italian Code, more diffuse and not all in the same place. There is no difference between English and French ideas on the meaning of *mens rea*: our definition is that ‘criminal responsibility lies on him who intentionally commits each of the ingredient acts or omissions of an offence with the intention of causing the result which completes it.’ One purpose of this definition is negative: nothing more than what is stated is necessary to constitute responsibility, in particular no intention to break the law or knowledge that one is breaking it. ... The requirement, in the definition of *mens rea*, that every ingredient must be intended makes it unnecessary to provide specifically that a mistake of fact is a defence (which is true only where *mens rea* is required), and the same reasoning would make it equally unnecessary to specify that a mistake of law is no defence; but here we laid aside strict logic for a moment and provide that ‘neither motive nor ignorance of law shall be material to criminal responsibility,’ true whether *mens rea* is required or not. ... Our definition does not imply its opposite, namely, that without intention there is never responsibility. This comes in a later subsection to the effect that *mens rea* is always necessary, save (a) where the definition of the offence provides otherwise, and (b) in a case of ‘contravention’ (punishable with ten days or less) ... ‘Contraventions’ usually prescribe what one must do rather than what one must not do ... Where any activity other than a ‘contravention; is to be punished without *mens rea* (which is not of course uncommon), the relevant section must say so.”⁶

⁶ Clarence Smith JA, ‘The Cameroon Penal Code: Practical Comparative Law,’ *International and Comparative Law Quarterly*, vol. 17, July 1968, 651, 661-662.

It follows from this that section 74 (2) purports to be simply a legislative, and therefore authoritative, definition of the term *mens rea* for the purpose of the Penal Code.

Fourthly, in a number of cases decided after the enactment of the Penal Code courts from time to time still resort to the concept of *mens rea*. For example, in *Tumenta Tebob v The People*⁷, Thomas CJ delivering the judgment of the Bamenda Court of Appeal said,

“We hold very strongly that for a charge to succeed under section 225 of the Penal Code not only must the evidence positively establish that the appellant used the money for a purpose other than the agreed purpose but it must also prove *mens rea*. Section 225 does not remove the burden placed on the prosecution under section 74 of the Penal Code of proving criminal responsibility.”

Also, in *Etoh Rudolf Makumba*⁸, Njamnsi J. delivering the judgment of the Buea Court of Appeal allowing the appeal against conviction for trespass to land said that

“since section 239 is an offence involving *mens rea* the appellant cannot be vicariously liable for committing that offence through the agency of the women found farming the land.”

Much recently, in *The People v Nchindia Isaac*⁹, Menyoli J. in convicting the defendant in the Lebialem High Court of murder said,

“Nothing demonstrates the accused’s *mens rea* more palpably than the fact that he stabbed the deceased 8 times as per the post-mortem report. The depth and the girth of the wounds, especially the one on the deceased’s back that measure 18 cm by 5 cm, is a clear indication that the blows were delivered with force, and therefore, with the intention to cause death or grievous bodily harm.”

Fifthly, it is a general presumption in English criminal law that every offence requires proof of a guilty mind, except if the offence is one of strict liability or one in which the wording excludes *mens rea* expressly or by construction. This is equally true in this country except that here the

⁷ (1974) Criminal Appeal No. BCA/16.c/73, unreported.

⁸ (1978) Criminal Appeal No. CASP/11.c/78, unreported.

⁹ (2005) 2 CCLR 1-125 Part 11, p.81.

requirement is not a matter of a mere presumption. It is a statutory prescription that every offence requires proof of the mental element except otherwise provided by law. Section 74 enunciates the fundamental principle of criminal responsibility. It states that the mental element is required for practically all serious offences (felonies and misdemeanours), and it is excluded in respect of simple offences unless specifically required in the definition of any particular simple offence. Every offence in this country whether in the Penal Code or not is a statutory offence. This is so because by the principle of legality, every infraction must be a written offence.

In the light of this evidence the concept of *mens rea* in English criminal law cannot be regarded as redundant under the Code and it would not be improper to refer to it, when appropriate, in order to demonstrate and explain the working of section 74(2). But to say so is not to suggest that the doctrine as such is directly applicable to the criminal law of this country and that it is to be followed in all its ramifications. A wholesale importation of all the ramifications of that doctrine into the criminal law of this country would be illegitimate. Since the provision of section 74(2) is the meaning assigned to '*mens rea*' that is the only valid meaning of that term for the purpose of the Code. Any other meaning has no place.

Section 2. Overview of the principle of criminal responsibility

The basic governing principle of the criminal law of this country is enunciated in section 74 in these terms:

“Section 74 – Punishment and Responsibility

(1) No penalty may be imposed except upon a person criminally responsible.

(2) Criminal responsibility shall lie on him who intentionally commits each of the ingredient acts or omissions of an offence with the intention of causing the result which completes it.

(3) Except as otherwise provided by law, no criminal responsibility shall arise from the result, though intended, of an omission.

(4) Except as otherwise provided by law, there shall be no criminal responsibility unless subsection (2) of this section has been satisfied: Provided that responsibility for a simple offence shall not require any intention to act or to omit or to cause the result.”

This section of the Code contains the statement of the general principle of criminal responsibility. This principle applies to all offences in this country,

whether those offences are in the Code or not. It applies in relation to any offence against any legislative enactment and to all persons charged with any such offence.

§1. Intention (including its semantic equivalents) and other fault elements

Section 74(2) indicates the broad mental requirement common to all offences. That mental element is intention, or more accurately intentional wrongdoing (the Roman-law '*dolus*' or the French-law '*dol*'¹⁰). However, while this is generally true, the idea of intention is also sometimes conveyed by a variety of other terms such as 'with intent to'¹¹, 'knowledge of'¹², 'wilful'¹³, 'intentionally'¹⁴, 'premeditation'¹⁵, and 'intended to cause'¹⁶. These terms are used in the context in which they appear as semantic equivalents of intention.

The appearance of the adverb 'wilfully' in an offence clearly indicates a requirement of intention as to all its physical elements. In *Sheppard*¹⁷, the House of Lords held that in the offence of wilfully neglecting a child or a young person under the age of 16 in a manner likely to cause unnecessary risk of injury to health, there was an element of *mens rea* as to the relevant risk. It went on to say that where the charge involved failure to provide adequate medical aid, the requirement of wilfulness could only be satisfied where the accused was aware the child's health might be at risk if it was not provided with medical aid or where his unawareness of this fact was due to not caring whether the child's health was at risk or not.

The Penal Code has a few offences of 'allowing'¹⁸ a particular thing to be done by another. These are mainly simple offences. Since it is of the very essence of the offence of allowing someone to do something that there should be knowledge, an offence of 'allowing' requires intention as to all its physical elements. Unlike 'permit' which can be by way of omission to prevent the prohibited thing occurring, the word 'cause' appearing in the definition of an

¹⁰ Stefani, Levasseur et Jambu-Merlin, *Criminologie et Science Pénitentiaire*, Dalloz, Paris, 1976; Pradel J, *Droit Pénal*, Cujas, Paris, 1976.

¹¹ See sections 103(c), 105(2), 108(2)(a), 115(1), 163, 168(1), 222(1), 224, 257, 282, 290(1)(c), 290(4), 305(5), 313(1), 331(i), 334(1)(b), 344, and 354(1)(b). In some cases intention is presumed: ss. 180(2), and 331(2).

¹² See sections 138 and 324.

¹³ See section 122(2).

¹⁴ See section 156(2).

¹⁵ See section 276(1)(a).

¹⁶ See section 156(5).

¹⁷ [1980] 3 All ER 899.

¹⁸ Section R. 368 (3)(6), s. R.369(6), s. R. 370(3); synonymous verbs are 'permitting' or 'suffering'.

offence¹⁹ requires a positive act by the accused which results in the prohibited occurrence. So, where an offence is defined simply in terms of causing something to happen, it is very likely that the offence is one of strict liability as to the occurrence of that thing. But where the offence is defined in terms of causing someone else to do something, ‘cause’ may be interpreted as requiring intention as to the thing being done.

It is not in all offences that the requisite mental element is intention. As a matter of policy section 74(4) allows variation of the mental element. The subsection directs attention to the fact that in some cases the mental element of an offence may consist of some other fault element. That other fault element is usually recklessness (rashness or carelessness)²⁰ or negligence²¹ (*culpa*, in Roman law; *culpabilité*, in French law). But terms such as ‘unintentionally’²², ‘dishonestly’²³, ‘falsely’²⁴, and ‘fraudulently’²⁵ do from time to time appear in the definition of certain offences.

§2. Act, omission, circumstance, consequence

Regarding the physical elements of an offence, in the vast majority of cases, this consists of an act and a consequence, or circumstance. In a few cases it consists of an omission²⁶. The physical ingredients of an offence thus consist of some or all of the following: a bodily movement by the defendant, circumstances, and consequence, plus negative elements like an omission or the absence of a circumstance.

It is clear from the formulation of 74(2) that once the physical elements of an offence have been proved, the mental element that needs to be proved is intention. The intention must relate to each of the ingredients comprised in the definition of the particular offence: intention as to the specified bodily movement or the specified omission, intention as to the specified circumstance, intention as to the specified consequence. It must therefore be shown that the accused acted voluntarily (whether or not he knew it is forbidden to act) and that he knew the circumstances and intended the specified consequence (if that be part of the definition of the offence) of his voluntary conduct. If a person acts voluntarily he acts intentionally.

¹⁹ Section R. 368 (6), s. R. 369 (1)(2)(3), s. R. 370(2).

²⁰ See sections 106(5)(6)(7), 228(2), and 289(1).

²¹ See sections 139 and 151.

²² See sections 122(2), 156(4), 278(1), 279(1), 280, 281, and 290(2).

²³ See section 184(1).

²⁴ See section 144 and 259.

²⁵ See section 256.

²⁶ See sections 107, 138, 145-151, 171-175, 179, 180, 228(1), 230(2) and 283.

Many substantive offences are defined without regard to whether the ultimate evil sought to be avoided has occurred. Examples of such offences are forgery, blackmail, burglary, and perjury. In such crimes no particular result is part of the definition of the offence. The crimes are defined in terms of the commission of a certain act in certain circumstances (the so-called formally defined crimes). The intention required for the commission of such offences relates only to the act or conduct. For example, in the offence of disturbance of a funeral ceremony or procession it suffices to show that the disturbance was intentional, whatever the result of such disturbance may have been. Intention includes knowledge and, in respect of a circumstance, it means that the accused knows or is aware of that particular circumstance. Therefore in the example given it would have to be shown that the accused intentionally disturbed the procession or ceremony knowing that it had to do with a funeral.

In crimes defined in terms of causing a certain result (the so-called result-crimes or materially defined crimes) the intention must relate both to the act and to the result of the act or the circumstances set out in the definition of the offence. If A stabs B to death it must be shown that the stabbing was intentional and that the ensuing death was also intended. If only the stabbing was intentional and death was not, or if death was intentional but the stabbing was not, then there is only unintentional killing and not murder. If the stabbing was intentional and death though intended failed to materialise due to some circumstance independent of the will of the accused, there will be an attempt.

§3. Ascription and imputability

Questions of responsibility can be said to arise at three different stages in a criminal trial. First, the court decides the straightforward factual issue of whether the defendant did the act or made the omission with which he is charged. It decides whether the conduct is ascribable to the defendant. The ascription or the non-ascription of an act or omission to the defendant depends on whether he acted with the requisite mental fault element for the offence.

Secondly, and assuming the conduct is attributable or ascribable to the defendant, the court decides the further issue of imputability of legal responsibility. In other words, it decides the further issue whether in law the defendant is responsible for the act or omission, that is, whether in law the act or omission can be imputed to him.

Thirdly, and assuming the defendant is legally responsible for the conduct and thus is guilty, the court decides the final issue of what sentence to pass,

taking into account degrees of responsibility, the circumstances of the offence and the offender, mitigating or aggravating factors and so on.

Section 3. Meaning of intention in criminal law

The Penal Code shies away from defining ‘intention’. In ordinary language, that term is synonymous with purpose, aim, plan, and voluntariness. That is also most people’s understanding of what constitutes intention and it corresponds to the general legal meaning assigned to the term. Osborn’s Concise Law Dictionary defines intention as “the purpose, aim or desire with which an act is done.”

As a philosophical matter intention is the mental power of directing the will towards performance of an act or towards bringing about a specific result. When a person directs his will to act, he acts intentionally whatever his motive or his aim may be in so directing his will. The act is his own, done by him of his own volition and with his own understanding. Having directed his will towards performance of an act, a man intends what he is doing or is trying to do. If a man with a loaded gun points at another at close range and fires, killing him, we say in all truthfulness that he intended to kill that person. He knew what he was doing and did what he did voluntarily.

“Intention, in whatever form, consists of two elements, namely a cognitive (or intellectual) and a conative (volitional or voluntative) element. The cognitive element consists in X’s knowledge of the surrounding circumstances and of the means which he must employ in order to achieve his goal. The conative element consists in directing the will towards a certain act or result. X decides to accomplish in practice what he has previously only pictured to himself. This decision to act transforms what was until then only ‘day-dreaming’, ‘wishing’ or ‘hoping’ into intention. Intention can therefore be defined as the will to commit the act or cause the result set out in the proscription of the crime, in the knowledge of the circumstances rendering such act or result unlawful. Defined even more tersely, one can say that intention is to know and to will an act or a result.”²⁷

²⁷ Snyman CR, *Criminal Law*, Butterworths, Durban, 1995, p. 146. Against Snyman’s conative element of intention consisting of ‘directing the will’ or exercise of will, one may pit the impressive argument by Williams against recognising an act of will in this context. “[O]ne cannot, by introspection, identify a conscious exercise of will previous to movement. Indeed, one cannot always find an exercise of will at all. Many acts are performed unthinkingly; not only a reflex like dropping a hot poker but much of the routine of life, such as shaving, eating, walking. We seem to switch on an ‘automatic pilot’ for many of the familiar tasks we perform;

Intention is thus a plan or a conscious decision to do some act (i.e., make some bodily movement) or to bring about a particular consequence or result.

Intention for legal purposes may refer to the prohibited conduct itself or to the consequences of the prohibited conduct. In relation to *conduct*, intention means conscious bodily movement, or conscious inactivity, with knowledge of the circumstances. In relation to *consequence of conduct*, intention means the desire that the consequence shall follow from the prohibited bodily movement or omission to move. The requirement that the mind concurs to the bodily movement (i.e., that the bodily movement be voluntary or conscious) eliminates from the meaning of an act inadvertent bodily movements such as tripping and falling, and reflex bodily movements such as blinking, yawning, movement of the head, eating, walking, and so on. If a person does something knowing what he is doing, he is clearly conscious of his act. The act is properly described as intentional. Any bodily movement that a person makes is intentional if the movement is conscious in that it is willed, volitional or purposive. A bodily movement is intentional if the person makes the movement knowing what he is doing. The sleepwalker is not in a state of normal consciousness and that is why for legal purposes he does not intentionally walk.

The test of intention is subjective. This means that intention is ascertained by a subjective investigation, that is, by looking into the mind of the defendant. This can only be done by studying the outward conduct of the defendant. The test of the reasonable man (objective test) comes in only as some indication of what the defendant probably intended.

Two ‘intention situations’ are contemplated by section 74(2). Under section 74(2) criminal responsibility for the most part is based on intention. But what is comprehended here by that term consists in fact of two intention-situations: first, intention as to each of the ingredient acts or omission or circumstance set out in the definition of the offence charged; secondly, intention as to the particular result or consequence that the definition of the physical ingredients of the offence charged requires the conduct of the accused to produce.

§1. Intention as to each ingredient act, omission, or circumstance

The criminal law does not proscribe conscious bodily movement in the abstract without reference to some specified act, omission, circumstance or

yet we are undoubtedly acting. Even when we make a conscious decision and act to carry it out, the act is something different from the preceding deliberation.” Williams G, *The Mental Element in Crime*, Goldberg’s Press, Jerusalem, 1965, p. 17.

consequence. Only certain kinds of conscious bodily movements made regarding some specified act, omission, or under certain circumstances and/or producing a specific result, are prohibited by the criminal law. Thus, where the law prohibits a voluntary act committed in specified circumstances without reference to consequences, the person doing the act is said to act intentionally if he knows the specified circumstances. In this case, he need not intend (desire or foresee) any consequence, because no consequence is specified in the law. Moreover, “the knowledge requisite for intention need not be so pronounced as to be in the forefront of consciousness; it is sufficient that the knowledge, if not subliminal, is at any rate luminal.”²⁸

The notion of intentional action thus implies that the actor knows the relevant circumstances of the act. A person does not act intentionally if he is ignorant. He does not act intentionally if he is mistaken as to the surrounding circumstances, where the circumstances are included in the definition of the offence as what he is supposed to be intentionally doing. A person who mistakenly takes another’s umbrella thinking it is his does not steal the umbrella because although he intentionally took the umbrella and although the umbrella belongs to another, yet he does not intend to steal an umbrella belonging to another.

An act is therefore not to be taken as intentional as to any circumstance that is not known. That is why it is said that ignorance or mistake of fact negatives knowledge. Intention means not only desire of the consequence of conduct but also knowledge of the surrounding facts. If there is ignorance or mistake of fact, then the act is not intentional as to that fact.

§2. Intention as to the specified prohibited consequence

To intend a prohibited consequence is to have in mind a fixed purpose to reach that consequence. A person cannot intend to do a thing unless he desires to do so. If a person desires that a consequence should follow from his conduct that consequence is said to be intended. If he tries to achieve his desire and starts to act to that end, the desire becomes the intention with which he acts. That desire need not be an end in itself. It may be a medial desire on the way to an ultimate desire. In this context intention means desire of the consequence of the act and, speaking precisely, we say the consequence was intended.

The consequence of an act is different from the act itself. Likewise, intending an act is different from intending the consequence of that act. One

²⁸ Williams G, *The Mental Element in Crime*, op. cit. p. 19.

should therefore be circumspect with ordinary language that sometimes tends to blur this distinction by speaking of some consequence as part of the act. For example, in ordinary language, a person says 'I killed him'. But in legal language what he really wants to say is 'I caused his death'. Death is not some act or omission but the result or consequence thereof. The word 'cause' indicates that the result or consequence of the act or omission is not part of the act or omission.

A person intends the consequence of his voluntary act not only when he desires it to happen but also when he foresees it as virtually certain to happen, whether he desires it or not. Foresight of probability or of certainty of consequence is sometimes described as 'oblique intention' (in contradistinction to 'purposive' or 'direct' intention). But such turn of phrase confusingly tends to suggest that foresight is the equivalent of intention or is intention itself, which it is not.

Foresight of consequence is relevant evidence on the basis of which an irresistible inference of intention may be drawn. Proof of intention depends on inferences which the court draws from all the evidence. This includes any evidence of foresight, on the part of the accused, of consequence as certain or highly probable. Hence, it is generally said that a person intends a consequence of his act if he foresees that that consequence is highly probable²⁹ or virtually certain to result from his act, although he does not aim to produce it. D intends to kill some armed robbers who have taken refuge in a house. He throws an explosive device into the building to blow up the robbers. He realises that it is inevitable that the building itself would be destroyed by the explosion. D would be regarded as having intended to destroy the building even though he wished the building no harm and would be delighted if it survived the explosion. Take another example. D points a loaded gun at P standing by him and pulls the trigger killing P. Clearly D foresaw the risk of P's death. From that foresight the inference is easily drawn that D's intention was to kill P.

²⁹ "The process of inferring intention from outward acts was at one time expressed in the maxim '*acta exterior indicant interior secreta*' [exterior acts indicate interior secrets], later more commonly replaced by the maxim that 'a person is taken to intend the natural and probable consequence of his acts.' ... The maxim is objectionable, because it wrongly implies that the probability of the outcome is always sufficient to lead to a conclusion that the outcome was intended. Probability is not the same as intention, and the maxim confuses one kind of evidence with the mental state itself. Often one can only judge whether a man intended a consequence by asking whether anyone in his shoes would have realised that the consequence was likely *and whether there is any reasonable interpretation of his actions other than the hypothesis that he intended the consequence*. The maxim that everyone intends, etc., is erroneous because it omits the emphasised words." Williams, *Textbook*, op. cit. p. 59.

Problems arise where the evidence suggests that achieving the prohibited consequence was not the defendant's purpose, because he had some other purpose, although he may have foreseen that that consequence was certain or probable to result as a by-product of his conduct. In this sort of case, although foresight is not itself intention, it is evidence on which intention can be inferred from. But the inference of intention would not be drawn in cases where the court is not satisfied that the prohibited consequence was the defendant's aim or purpose. In offences in which the defendant is expressly required to act with a specific purpose, only intention in the purposive sense will suffice for such offences. Furthermore, a man's knowledge that a particular consequence will probably result from his act is not a sufficient basis for saying that he intends it because mere probability involves substantial doubt. Intention is thus inferable only from foreseen certainty of consequence or from very high probability of consequences.

There are cases in which the consequence of an act is taken to have been intended even though the defendant realised from the start that the odds are against success and therefore that success is improbable. A person has an intention to kill if he fires at someone whom he believes to be outside the normal range of his gun in an endeavour to kill him. The common example is that of a gunman at the window of a tall building who carefully aims at a passerby in the street and fires. His chances of hitting the passerby with that gun at that range may be one in a hundred, and being an experienced marksman he may know that. But his relatively poor chance of success is simply of no weight when all the other factors speak so loudly of his intention, namely to wound or, presumably, kill the passerby. It may be that the consequence was merely hoped for. But hope is desire in circumstances of low probability, and it is sufficient for intention.

It is therefore clear that provided that a person has decided to bring about a particular consequence (insofar as it lies within his power) a person acts with intention in relation to the consequence even though he believes he is unlikely to succeed in bringing the consequence about. A person is also said to act with an intention to cause a particular consequence, even though it is not desired in itself, if that consequence is the means, a condition precedent, to the achievement of a desired objective and he decides to cause that consequence (insofar as it lies within his powers).

§3. Proof of intention

Facts are proved in court by the direct evidence of witnesses³⁰ who experienced or perceived them. They may also be proved by circumstantial (indirect) evidence of witnesses as to other facts, from which the facts in issue are inferred. Intention is proved in the same way other facts are proved. It may be proved directly from what the defendant says. What the defendant said spontaneously or contemporaneously as an integral part of the event or of his conduct is admissible in evidence under the doctrine of *res gestae* (state of affairs) as an exception to the rule against hearsay. Any prior or subsequent admission of what the defendant intended is also admissible in evidence. So too is a confession of guilt made before or at the trial.

The defendant may deny the court direct access to his mind by giving the court no assistance. In the face of this difficulty the court would have to gather the defendant's state of mind at the time in question from his previous, contemporaneous or subsequent outward conduct. Evidence of what the defendant did on the occasion in question is crucial in deciphering his state of mind. If he pointed a loaded gun at a man's head, fires and kills him, the court will certainly credit the defendant with an intention to kill because that is the only reasonable hypothesis to explain his conduct. The defendant may deny that he intended to kill and that he only intended to frighten the deceased. But such a defence would, in the circumstances, be too thin to accept. The court is not obliged to swallow a denial that is in common sense unswallowable.

Section 4. Cognate concepts: premeditation, transferred intention etc.

§1. Premeditation

Ordinarily, premeditation simply means 'thought of beforehand' or 'planned in advance'. To meditate on something is to think about it deeply; to plan, consider, think of, or reflect upon doing something. A premeditated killing is therefore one that has been thought of, considered, or planned in advanced. It presupposes that the killer had time to reflect upon the killing before carrying it out. There are various degrees of the unlawful killing of a human being, from atrocious to excusable killing.³¹ The most heinous type (and also the highest degree) of unlawful killing is denoted in the Code as 'capital murder'³². It is so denoted because homicide under circumstances of premeditation attracts mandatory capital punishment, that is, it is punishable

³⁰ A defendant may elect to give evidence as a witness on his own behalf.

³¹ Anyangwe C, *Criminal Law in Cameroon – Specific Offences*, chapter 15.

³² Section 276.

by death. Capital murder is defined as murder committed after premeditation or by poisoning or in the course of committing another offence.

Premeditation is thus a species of intention. The problem for the lawyer is that of ascertaining how long the intention to kill lasted before the actual killing took place. A person who kills even on the spur of the moment necessarily must have thought about it for some appreciable time before the killing, even if this might mean just a matter of seconds. If, legally, premeditation simply means having thought about the killing beforehand this would make a complete nonsense of the Code distinction between premeditated murder and intentional murder.

The courts have therefore insisted that the concept of premeditation requires more than just intention to kill and that it must be shown that the defendant maturely and meaningfully reflected upon the gravity of his contemplated conduct and still decided to go ahead with it. In the words of the court in *Aliyo Lahpana Ndimasa*³³, premeditation in law means “at least a plan elaborated within a period of time preceding the execution sufficiently long for reflection which ought to have led to the abandonment of the scheme.” The court uses the terms ‘a plan elaborated’ and ‘a scheme’. But there need be no plan or scheme as such. All that is required is an intention formed within a period of time preceding the killing and sufficiently long enough as to have allowed the defendant to think over the gravity of the killing he contemplates.

The question is not whether the particular defendant actually thought about the gravity of the action he had in mind. It is whether the interval between forming the intention to kill and actually killing the victim was of such duration as would allow a reasonable person time to think over the contemplated killing. If killing takes place after that ‘reflection time’ the defendant will be accounted guilty of premeditated murder, an offence that carries a mandatory death penalty. A classic example of premeditated murder is the case where a man lies in wait for his victim and then kills him when he comes by.

§2. Ulterior intention

The desire to do a prohibited act or to achieve a prohibited result or consequence is denoted as ‘direct intention’. By contrast, ‘ulterior intention’ is literally intention that is not open but concealed or hidden. In criminal law ‘ulterior intention’ denotes a further type of intention required in some

³³ (1968-1970) UYLR 19.

offences. Sometimes this further intention on the part of the defendant relates to an intended consequence of the prohibited conduct by the defendant. But more often than not it relates to something ulterior to the consequence. Where the definition of an offence requires a further intention as to a particular thing, then it must be shown that that further thing was intended. The further thing may not be a requisite of the physical ingredients of the offence. If it is not, the fact that it never occurs is irrelevant; the offence is nevertheless consummated.

Sometimes conduct which would not otherwise be criminal is made criminal. For example, spreading rumour, even if it is false or misleading, is not in itself an offence. But if it is done with intent to injure the credit of the state it becomes a punishable offence under section 222(1)(a) of the Penal Code. Sometimes also the criminal law punishes what would otherwise be a less severe offence with much greater severity, if performed with intent to perpetrate some further act. For example, damaging any construction or installation is punishable as a misdemeanour under section 316(2). But where the same act is done with intent to injure the defence of the nation it becomes a treasonable felony under section 103(c) of the Penal Code. In these and similar cases it must be proved that when the defendant did the prohibited act he had decided (purposive intention) to do all he could towards the performance of the subsequent act. Sometimes the further intention relates to an intended consequence of the prohibited act committed by the defendant.

§3. Specific intent and basic intent

These are obscure terms. In some English legal circles, judicial and academic, ‘specific intent’ was used to refer to the intention required for certain of the more serious crimes in England (there was no authoritative list of any such crimes), while ‘basic intent’ was used to refer to the intention required for certain less serious crimes. Since there was no authoritative allocation of crimes in either class, it was a mystery which crimes fell into one category or the other. This mystical distinction need not detain us as it is of no relevance to the criminal law of this country. In this country a crime can only be committed intentionally or unintentionally (recklessly or negligently).

§4. Transferred intention

Where a person intends to harm **V** but in fact harms **B** instead, American and English courts readily convict the perpetrator of the harm on the basis of what is denoted as the doctrine of ‘transferred malice’ or ‘transferred intention’. That doctrine applies “whenever a wrongful intention is formed in respect of a person or thing but it takes effect upon another person or thing,

where the intended and the actual ‘victim’ (person or thing) fall within the definition of the offence.”³⁴

What is involved in cases of transferred intention is not a species of mistake. Though closely similar, the case of mistake is analytically different from the case of transferred intention. Two forms of mistake may be envisaged, mistake as to kind of harm and mistake as to victim. The case of mistake as to kind of harm is that in which D commits the physical element of one offence, *x*, thinking that he is committing a different offence, *y*. For example, D sells what he believes is marijuana when in fact it is hashish, both being prohibited drugs govern by different statutory provisions. In this case, a strict application of the normal legal principle would result in D escaping conviction on either offence. On the one hand, D cannot be convicted of the first offence, *x*, because the requisite mental element on the part of D is lacking. D does not intend to sell hashish. On the other hand, D cannot also be convicted of the second offence, *y*, because D has not committed the physical element of that offence. What D sells is not marijuana.

“This is unsatisfactory, because it gives considerable scope for dishonest or at least unmeritorious defences. It may sometimes be fairly easy for a person who is charged with an offence A to explain away his subterfuges, secrecy and lies by saying that he was really intending to commit offence B ... A court would therefore be strongly disposed to cast about for some legal means of nullifying the defence.”³⁵

Mistake as to person or victim is an immaterial mistake in law and therefore is never a defence. A man may make a mistake as to the person he is assaulting, or the house he is burgling. That mistake is immaterial and he will not escape conviction for the offence he has committed.³⁶ The principle here stated is consistent with what section 284 of the Penal Code declares:

“For the purpose of sections 275 to 281 inclusive the infliction of death or the use of force or interference shall be treated as intentional notwithstanding that it is intended to be inflicted on or used against a different person.”

³⁴ Williams G, *Textbook*, op. cit, p. 144.

³⁵ Ibid. p. 81.

³⁶ However, if the mistake is relevant to guilt it is capable of negating mental element, as where a householder uses force against an innocent person thinking he is a burglar.

The section deals with transferred intention in the context of what it calls ‘mistake as to victim’ and within the narrow limits of fatal and non-fatal assaults. D hears a noise behind the door of his house and believing that it was that of an intruder shoots through the door killing V who turns out to be his girlfriend. The logic of the section appears to be that if D intended to kill or to harm a person and intentionally does an act which results in the death of or in harm to a person, the identity of the person killed or injured is an immaterial detail.³⁷

The transferred intention situation is that in which the blow or the shot by D though well calculated, nevertheless misses the intended victim or thing due to some factor and hits some other person or thing. D throws a projectile at A but it misses him and accidentally hits B. D poisons A’s drink or food or prescribed medicine which is subsequently consumed by B. D attempts to set fire to A’s dwelling house, but in fact burns down B’s adjoining dwelling house. D aims a karate chop at A, who ducks and the chop lands on B standing behind A. D fires at A intending to kill him, but the bullet hits and kills B who suddenly emerged from nowhere in front of A. D shoots to kill A, but the bullet misses, hits an iron pole nearby, ricochets and hits B killing him. D puts poison in A’s drink intending to injure him, and the liquid is subsequently consumed by B who suffers grievous bodily harm.

In all these instances the defendant’s bad aim went awry and attained not the intended but the unintended victim. In the eyes of the law the defendant had intention also in respect of the unintended (actual) victim. Borrowing the tort doctrine of transferred intent and using it in the criminal context, courts in England and America have no difficulty in holding that the defendant had intention also in respect of the unintended victim. The intention is deemed to follow the criminal act regardless of who turns out to be the victim. Admittedly, the defendant aimed at an intended victim. However, since his criminal act took effect on the actual victim it is deemed in law to be an intentional attack upon the actual victim. He is guilty to the same extent as if he had been on target, hitting the person he really intended to hit. The intention in respect of the intended victim is transferred by a legal fiction to the victim who is actually hit.

The doctrine of transferred intention is thus a convenient legal fiction resorted to by the courts to achieve a result considered just and desirable. D intended to damage property, or intended to assault a person, or intended to kill a person. The identity of the property damaged, or the person assaulted, or

³⁷ Anyangwe C, *Criminal Law – Specific Offences*, chapter 15 §3.

the person killed is an immaterial particular and therefore not a credible defence. But a common criticism of the doctrine is its fictitious nature. D clearly had no intention in respect of the actual or unintended victim. In the absence of proof that he was at least reckless (i.e. he foresaw the probability of his act taking effect on the actual victim) it is hard to see on what normal principle he can be held responsible. In fatal assault cases the indictment does not allege a general intention to kill just any unidentified person, but a specific intention to kill a specified person. Therefore, in order to secure a conviction the prosecution ought to be required to show that D had the intention to kill the actual victim, and that is something which even the prosecution itself would readily admit D never had.

Despite this compelling criticism courts consider the doctrine a convenient legal device that does practical justice. This point may be illustrated by two old English murder cases decided on the basis of the doctrine of transferred intention. In *R. v. Gore*³⁸, medicine was prepared for Gore by an apothecary (i.e. a druggist or pharmacist) named Martin at the instance of a Dr Gray. Gore's wife, Agnes, put ratsbane (i.e. rat poison) in the medicine intending that Gore should consume it and die. The medicine was consumed by three persons, Gore, Roper his father-in-law, and one C. All three of them were taken ill but they soon recovered. Three days later Roper took what remained of the medicine to Dr Gray and complained. Gray summoned Martin who said he would take the medicine himself in order to show that he had put nothing wrong in it. Martin stirred the medicine, consumed it and died a day later. The question before the court was whether Agnes Gore was guilty of murdering Martin having regard to the fact that Martin consumed the medicine "of his own head", and increased the probability of its having fatal effects by stirring it. It was held that Agnes was guilty of the murder of Martin,

"for the law conjoins the murderous intention of Agnes in putting the poison into the electuary [i.e. medicinal powder etc. mixed with honey or other sweet substance] to kill her husband, with the event which then ensued; [namely] the death of the said Martin; for the putting of the poison into the electuary is the occasion and cause; and the poisoning and death of the said Martin is the event, *quia eventus est qui ex causa sequitur, et dicuntur eventus quia ex causis eventiunt*, and the stirring of the electuary by Martin with his knife without the putting in of the poison by Agnes could not have been the cause of his death."

³⁸ (1611) 77 ER 853; 9 Co. Rep. 81.

It was also held that

“if A puts poison into a pot of wine, etc to the intent to poison B and sets it in a place where he supposes B will come and drink of it, and by accident C (to whom A has no malice) comes, out of his own head takes the pot and drinks of it, of which poison he dies, it is murder in A for the law couples the event with the intention, and the end with the cause.”

In *R. v. Saunders & Archer*³⁹, Archer incited Saunders to murder his wife, Mrs. Saunders. Saunders decided to do so. He mixed poison in a roasted apple and gave it to his wife to eat. She ate a small part of it and gave the remainder to their infant child. Saunders watched in horror as the child ate the apple. He did not have the wit to make some excuse for taking the apple from the child. The child consumed the poisoned fruit and died soon afterwards. It was held that Saunders was guilty of the murder of the child. Archer was held not guilty of accessory to the murder of the child.

The court reasoned that the child’s death lay fully at the feet of Saunders. Saunders poisoned the apple. His intended victim was of course his wife. But he was present when his wife gave the poisoned apple to their child. He was the only one who knew the apple was poisoned. He did nothing and watched while the child ate the apple and died. He thus killed his own child. There was no accessory to this murder.

In terms of its scope the doctrine of transferred intention applies in England and America to cases of murder, assault and damage to property. In this country the doctrine also applies but does not extend to damage to property.

Defences are transferred with the intention. If D acted against X in self-defence, he will be deemed to have acted in self-defence against Y. The doctrine of transferred intention also applies in respect of accessoryship. The accessory remains responsible to the same extent as the principal offender where the intended offence takes effect on an unintended ‘victim’ (person or property), unless the principal offender deliberately settles on a victim other than the one in respect of whom the incitement was made (*R. v. Saunders & Archer*). If the inciter orders A to be killed and the killer goes and deliberately kills B instead, the inciter clearly has no part in that crime. But if the principal offender simply made a mistake as to the identity of the ‘victim’ (person or property) intended by the accessory to be affected, the accessory remains responsible as well notwithstanding the mistake.

³⁹ (1575) 75 ER 706.

On principle there is no reason why the doctrine of transferred intention should not apply in the law of attempt. D shoots at A to kill him, but misses and wounds B. D will be convicted of the attempted murder of A. But the doctrine may be prayed in aid to convict D of the attempted murder of B as well (if the prosecution chooses not to bring a charge of unintentional causing of bodily harm to B).

However, the doctrine does not apply to cases of abortion because the doctrine comes into play only when the defendant intends a particular crime, and commits the physical element of that crime (though with respect to a different victim). In abortion the defendant intends the abortion. Supposing that what he does in addition is to kill the woman. The killing of the woman is a different crime, not abortion.

The doctrine is traditionally confined to situations in which the resultant harm is similar in kind to the intended harm. If D intending to do bodily harm to A, throws a missile which accidentally breaks B's window, D cannot be guilty of malicious damage of property because his actual intent to do bodily harm to A is different in kind from an intent to damage B's property.⁴⁰ Intention can be transferred only within the same crime. The reason is that the defendant must have the intention and commit the act appropriate to the crime with which he is charged, even though they may exist in respect of different persons or objects. Combining the elements of two different offences is not allowed. Supposing a hunter fires at an animal, misses and hits a man; or supposing an attacker aims at a man, misses and hits an animal. The hunter or the attacker, as the case may be, cannot be charged either with an offence against the person or with an offence against an animal because no law makes it an offence generally to injure or even to kill an animal. If there is such a law then a charge would lie; the difference between the 'animal' aimed at and the 'animal' injured or killed would be immaterial. Even if there were a general law against killing animals the intention to kill an animal and the intention to kill a man cannot be an interchangeable intention. In the example given if the man were killed the attacker might be guilty of unintentional killing.

Transferred intention is different from the situation where, say, a psychopath decides to kill without having any particular person in mind and then goes out and shoots and kills anyone within range, or a terrorist detonates a bomb concealed in a vehicle or a facility full of people. The psychopath has

⁴⁰ *R. v. Pembliton* [1874-80] All E.R. 1163. Pembliton's conviction for malicious damage to property was quashed on the ground that there was no *mens rea* in relation to the breaking of the window. In quashing the conviction the court reasoned that, "The prisoner threw the stone which broke the window, but that he threw it at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window."

the general intention to cause death; and so does the terrorist. Either of them is guilty of murder for the simple reason that an intention to kill just anyone is an intention to kill the particular person actually killed. This is as true in logic as it is in law.

Indeed, some murder offences are couched in such a way as to make it clear that intention can be transferred from the intended to the actual victim. Supposing an offence is drafted in this manner, “whoever shall wound or cause any grievous bodily harm to any person with intention to do some grievous bodily harm to *any person*” is guilty of an offence. This formulation does not require that the intention to do harm should be in respect of the person wounded or to whom harm is caused. If that result was intended the phrase ‘such person’ would have been used. The formulation instead speaks of intention to do grievous bodily harm to ‘any person’, that is, to just any person. The object of such a formulation is clearly to indicate that intention can be transferred from the intended victim to the actual victim. The result is the same if an offence is phrased in these terms, as is murder under section 275 of the Penal Code, “whoever intentionally causes another’s death” is guilty of murder. Here too, the object of this phraseology indicates that the identity of the murder victim is immaterial: murder is murder even if the actual victim is not the intended victim.

Section 5. Motive

§1. Motive and intention distinguished

Intention is different from motive⁴¹ and can be proved in court in the same way other facts are proved in court. In ordinary language intention and motive are sometimes used as though they are convertible terms. But in law the intention to commit a crime is one thing and the motive for committing a crime is another thing. A person’s intention is his immediate purpose; his motive is his underlying purpose, his reason for acting as he did. In other words a motive is “any reason for the accused’s conduct which induces him to do an unlawful act but which does not form part of the mental element of the offence as defined by law.”⁴² Motive is the reason for the defendant’s set goal but intention is what activates and directs conduct towards that set goal or object. Intention is executed by series of bodily motion and trains of thought and feeling.

Generally, therefore, motive refers to some ulterior intent which, in most cases, forms no part of the mental element of the offence as defined and

⁴¹ Sections 332(1)(d), 344(1), and 358(1).

⁴² Okonkwo and Naish, *Criminal Law in Nigeria*, Sweet & Maxwell, London, 1980, p. 57.

consequently is irrelevant in the eyes of the law (except as mitigating factor in certain cases). Supposing an heir presumptive to the throne tired of waiting to become the next *Fon* murders the reigning *Fon* with the motive of immediately taking over the *Fonship*. The intention or desire to kill the *Fon* is the immediate state of mind that actuates or directs action to kill and which makes the act murder of a monarch (regicide). The underlying purpose to take over the crown as *Fon* is the ulterior intent or motive.⁴³ The heir to the throne intentionally killed the *Fon*; he had a motive for his intentional action.

In *Senior*⁴⁴, X abstained from providing medical assistance to his sick child. X belonged to a religious sect and believed that God would cure the child without the need for medical intervention. The child died and X was convicted of manslaughter, “no matter what his motives.” In *Lowe*⁴⁵, however, *Senior* was held to be no longer good law on the ground that an omission would not suffice for constructive manslaughter. In that case X’s baby died some ten weeks after birth. At the time of her death the baby was grossly dehydrated and emaciated. X was convicted of wilfully neglecting the child and of manslaughter. His appeal against the manslaughter conviction was allowed, the Court of Appeal holding that a finding of manslaughter did not inexorably follow from a finding of wilful neglect. There was a clear distinction between an *omission* likely to cause harm and an *act* likely to cause harm.

It is submitted that the manslaughter conviction in *Senior* and in *Lowe* by the lower court reflect the position of the law in this country regarding children and other persons unable to look after themselves. Under the Penal Code the crime of assault occasioning death (denoted in some jurisdictions as manslaughter) may also be committed by the intentional use of constructive force, an expression which, in terms of section 285, includes deprivation of nourishment or care to a degree endangering the health of the person so deprived.⁴⁶

⁴³ Other motives that a murderer might have include the desire to obtain the satisfaction of revenge (revenge motive), or to get rid of a rival (motive of jealousy or envy), to promote a political or religious object (political/ religious motive), or for financial gain (motive of greed), or to eliminate a source of incriminating evidence.

⁴⁴ [1889] 1 QB 283.

⁴⁵ [1973] 1 All ER 805, CA.

⁴⁶ Failure to provide nourishment may be *deliberate*, as when the child’s need for it is perceived yet nothing is done; *negligent*, as when the need ought reasonably to have been perceived but was not; or entirely *blameless*, as when the need was not perceived but was not such as ought to have been perceived by an ordinary reasonable parent. If a parent does not appreciate that his child needs adequate nourishment, then the existence of an absolute offence could have no effect on his conduct, and it would not accord with ordinary concepts of justice to hold him blameworthy. Now, in *R v Sheppard* (1981) AC 394, did the child in fact need medical aid at the time D was charged with killing it? Was D aware at that time that the

Motive was also considered as of no moment in *Chandler v. DPP*.⁴⁷ X and others tried to enter an airfield to protest against nuclear weapons carried by aircraft flying from that air force base. They intended to prevent aircraft from taking off by obstructing the runway. X's appeal against conviction was dismissed because their intention to obstruct the runway was prejudicial to aircraft safety and state security. X's motive (purpose) of getting rid of nuclear weapons was treated as irrelevant. Similarly, in *Yip Chiu-Cheung*⁴⁸, the Privy Council rejected the 'good' motive of a police officer. X, a law enforcement officer, imported illegal drugs to entrap members of a drug ring. The Court was not impressed by his 'good' motive in breaking the law to enforce the law.

In one medical case the question was whether the doctor's motive in administering a fatal dose of injection that ended his patient's life was therapeutic or analgesic. In *R v. Cox*⁴⁹, Dr Cox, a consultant rheumatologist, was charged with the attempted murder of his patient, Mrs. Lillian Boyes, who was suffering from rheumatoid arthritis and other conditions. She was dying and because she was suffering extreme pain, pleaded for help to die. A short time before her death Dr Cox administered to her an injection of potassium chloride in a quantity which could have no therapeutic purpose. Dr Cox admitted administering the injection and its quantity.

The only issue of contention was his purpose in giving it. The prosecution alleged that in administering it Dr Cox's intention was to end Mrs. Boyes' life. The defence argued that his primary purpose was to relieve pain and that there was no intention to kill. Dr Cox was charged with attempted murder as Mrs. Boyes' body had been cremated and thus the actual cause of death could not be established, that is, whether she died from the effects of the potassium chloride injection or whether she died of natural causes before it took effect.

The judge in the Winchester Crown Court directed the jury in these terms:

"We all appreciate that some medical treatment, whether of a positive, therapeutic character or solely of an analgesic kind by which I mean designed solely to alleviate pain and suffering, some treatment carries with it a serious risk to the health or even the life of the patient. Doctors are frequently confronted with, no doubt, distressing dilemmas. They have to

child's health might be at risk if medical aid were not provided? Was D's unawareness of that fact due to his not caring whether the child's health was at risk or not?

⁴⁷ [1962] 3 All ER 142, HL.

⁴⁸ [1994] 2 All ER 924.

⁴⁹ (1992), 12 Butterworths Medico-Legal Reports, 18 September 1992.

make up their minds as to whether the risk, even to the life of their patient, attendant upon their contemplated form of treatment, is such that the risk is, or is not, medically justified. If a doctor genuinely believes that a certain course is beneficial to his patient either therapeutically or analgesically, then even though he recognizes that course carries with it a risk to life, he is fully entitled nonetheless, to pursue it. If in those circumstances the patient dies, nobody could possibly suggest that in that situation the doctor was guilty of murder or attempted murder. The problem is obviously particularly acute in the case of those who are terminally ill and in considerable pain, if not agony. Such was the case of Lillian Boyes. It was plainly Dr Cox's duty to do all that was medically possible to alleviate her pain and suffering, even if the course adopted carried with it an obvious risk that, as a side effect of that treatment, her death would be rendered likely or even certain. There can be no doubt that the use of drugs to reduce pain and suffering will often be fully justified notwithstanding that it will, in fact, hasten the moment of death. What can never be lawful is the use of drugs with the primary purpose of hastening the moment of death. And so in deciding Dr Cox's intention, the distinction the law requires you to draw is this. Is it proved that in giving that injection, in that form and in those amounts, Dr Cox's primary purpose was to bring the life of Lillian Boyes to an end? If it was, then he is guilty. If, on the other hand, it was, or may have been, his primary purpose in acting as he did to alleviate her pain and suffering, then he is not guilty. That is so even though he recognised that, in fulfilling that primary purpose, he might or even hasten the moment of her death."

The jury returned a verdict of guilty as charged. However, it is important to appreciate the fact that medical treatment in accordance with approved contemporary medical practice can never affect the doctor's liability even if the treatment itself may be accounted a cause of the prohibited result.

"A surgeon may cause death in the course of an operation which was recognised by him and the medical profession in general to be dangerous in the sense that it was medically advisable to risk the known chance that even when conducted with the best of skill and care it might cause the patient's death. This would be a risk which the law does not forbid to be taken but permits to be taken, and the killing will not be an *actus reus*."⁵⁰

⁵⁰ Cecil Turner, op. cit. p. 24.

§2. Motive is generally irrelevant

As a general rule, propounded in section 75 of the Penal Code, the defendant's motive, good or bad, however laudable or estimable, is irrelevant to his criminal responsibility. The nature of an offence is not altered because of the defendant's motive in committing it. Further, the fact that the defendant had a good motive in committing the offence will not necessarily impel a court to reduce penalty. The motive by which a person is induced to form an intention is immaterial as regards criminal responsibility. Robin Hood acts out of laudable motives when he steals from the rich to give to the poor. But his good motive will not save him from a conviction for theft. The physician who on request by a terminally-ill patient mercifully terminates the patient's life probably acts out of good motive. But in countries where euthanasia is illegal, the physician's good motive will not save him from a murder conviction. A destitute man may take food from a rich man to feed his starving child. The conduct remains a crime though the defendant may have acted out of good motive. Offences of forgery and suchlike do not require selfishness, so that a person who forges a will from motives of altruism and benevolence will not escape conviction for forgery. A person, who breaks the law with a good motive, or for purposes of law enforcement such as entrapment, or for conscientious reasons, or from religious belief, still commits a crime, the goodness of his motive notwithstanding.

On the other hand, if the conduct of the defendant is otherwise lawful, it does not become unlawful merely because his motive is bad (morally improper). The 'hangman' may be very happy executing the condemned man, a person he has hated all his life; but the execution is not illegal. A man acting in reasonable self-defence against his attacker may take total delight in the blows he gives but he does not act illegally. A man who destroys an adjoining house to prevent a raging fire from spreading and consuming a high-rise block of flats does not act illegally even though he may take absolute delight in destroying the house which just happens to be that of his enemy.

§3. Motive is relevant in certain instances

Exceptionally, the defendant's motive may be relevant to his responsibility. This is particularly the case where the definition of the offence expressly so provides. The law itself takes account of motive as one of the ingredients of an offence. Thus, motive is made expressly relevant in certain sections of the Penal Code. The defendant escapes a conviction under section 332(3)(d) if he can show 'reasonable excuse' (i.e. a good motive); under section 358(1) if he can show that he acted with 'just cause' (i.e. good reason or motive); under section 339(1) if he can show that his conduct was 'necessary

for the saving of the mother' (i.e. good motive); and under section 344(1) if he can show that he did not act 'in order to satisfy the desires of another'.

Furthermore, some crimes require two intents, one lying behind the other; the first or the second being in fact the motive. For example a burglar intentionally enters a house with the intention of stealing from it. There is an intentional entry with the ulterior intent of stealing from the house. The ulterior intent is in fact the motive for the entry and forms part of the legal definition of the offence. Sometimes the ulterior intent is expressly denoted in the statute as motive; but more often than not it is denoted by the phrase 'with intent' to do something, namely, 'to injure'⁵¹; 'to surrender'⁵²; 'to commit felony'⁵³; 'to procure'⁵⁴; 'to influence'⁵⁵; 'to abandon'⁵⁶; 'to commit any felony or misdemeanour'⁵⁷; 'to engender a hope of gain'⁵⁸; 'to avoid'⁵⁹; 'to mislead'⁶⁰; or 'to withdraw'⁶¹. The phrase 'with a view to' in section 265(1)(a) is also an ulterior-motive denoting expression.

Motive is sometimes taken into account so as to do justice in specific cases. It may be taken into account by the court when passing sentence and so it is relevant to the quantum of punishment. A good motive may have an influence on the degree of punishment. It may, in a fit case, be considered as mitigating circumstance. Motive might further be relevant to proof, that is, as evidence going to prove criminal intent, or going to disprove it because if there is a motive it strengthens the prosecution's case.

"The prosecution may prove a motive for the crime if it helps them to establish their case, as a matter of circumstantial evidence; but they are not legally bound to prove motive, because a 'motiveless' crime is still a crime. Conversely, the defendant may adduce evidence of his good motive in order to reduce his punishment, perhaps to vanishing-point. Good motive is not a defence but simply a matter of extenuation."⁶²

⁵¹ Sections 103(c), 108(2)(a), 222(1), 224, 305(5).

⁵² Section 105(2).

⁵³ Section 115(1).

⁵⁴ Section 163.

⁵⁵ Sections 168(1), 257.

⁵⁶ Sections 354(1)(b), 282

⁵⁷ Section 248(1).

⁵⁸ Section 249(1).

⁵⁹ Sections 290(1)(c), 290(4), 331(1).

⁶⁰ Section 313(1).

⁶¹ Section 334(1)(b).

⁶² Williams G, *Textbook*, op. cit. p. 56.

Sometimes also, motive is taken into account in criminal procedure so as to decide whether to order a joint trial or not.

Section 6. Ignorance of the law and mistake of fact

§1. Ignorance of the law

Since intention includes knowledge it is of interest to consider the extent to which ignorance of the law impinges on the concept of intention. The requirement of mental element for criminal responsibility does not mean that the defendant must have known or been aware of the illegality of his conduct. In fact, words relating to state of mind (intention, recklessness, carelessness and negligence) do not let in a defence of ignorance of the criminal law.

The general rule is that ignorance or mistake of law is no excuse. A mistake of law occurs when the mistake is not as to the actual facts but as to their legal relevance, consequence or significance. Take the example of a man who points a loaded gun at another. The mistake of law is not the act of pointing a loaded gun but the legal significance that the act is an offence. Take another example, that of a married person who arrives in a country that recognises only monogamy and goes through a ceremony of marriage with another woman thinking that the laws of that country recognise polygamy. The mistake of law is not the act of going through the motion of a marriage ceremony with a second woman but the mistaken belief that polygamy is legally permissible in that country.

The law ousts mistaken belief as a defence to a criminal charge. Take the classic case of the defendant who believes she is smuggling ‘*okrika*’ (i.e., used, second hand or pre-owned clothing) into the country in violation of health and customs regulations when in fact she is importing contraband goods. Her mistaken belief will not save her from conviction for trading in contraband goods.

The maxim is *ignorantia juris non excusat*⁶³. It was originally formulated at a time when the list of crimes, broadly speaking, represented the morality of the time and thus consisted essentially of crimes *mala in se*. But in the contemporary world there are many other crimes that are the result of administrative or social regulation, crimes *mala prohibita*, which are equally governed by the maxim. The rule is, then, that whereas ignorance of fact can excuse, to the extent that it negatives the mental element in crime, ignorance of law generally does not. What this means is that the citizen is expected to

⁶³ This Latin phrase means ‘ignorance of the law is no excuse’. Another formulation of the maxim is *nemo censetur ignorare legem*, no one is deemed to be ignorant of the law.

know the existence and precise terms of all penal legislation pertaining to him, however obscure its wording or chaotic its arrangement might be and even though it might not even be easily accessible. The maxim thus casts upon the individual a broad duty to know the law.

The maxim is captured in the provision of section 75 of the Penal Code which provides that “neither ignorance of the law nor motive shall be material to criminal responsibility”. This means mistake or ignorance either as to the criminal law that creates an offence or as to the state of the law or as to the elements of an offence is immaterial to criminal responsibility and so is not admissible as a defence to a criminal charge, though it may nonetheless afford a good reason for the awarding of a mitigated punishment. The section in effect lays down an irrebuttable presumption of law that ignorance of the law is no defence to a criminal charge.

The defendant may be ignorant of the law but that does not necessarily mean absence of mental element on his part; nor would that ignorance necessarily negative the required mental element for conviction. Therefore, ignorance (mistake) of the law does not afford any excuse for any conduct which would otherwise constitute an offence, unless knowledge of the law by the defendant is expressly declared to be an element of the offence. If an employee gives a gift in order to induce his boss to promote him he cannot be heard to say he did not know that payment of bribe is contrary to law. A man who breaks the law in justifiable ignorance of its existence and with no intention of committing even a moral wrong, still commits a crime. Under the rule propounded by section 75 a person pleading cultural difference or even the visitor from Mars who proves that he mistakenly believed his conduct to be lawful will not be exempt from criminal liability.

However, although ignorance of law is *per se* no defence, it may yet be relevant to the defendant’s argument. It may relate to the absence of mental element. The ignorance may be strong evidence that the defendant lacked the particular mental element which needs to be proved against him under the crime charged. The defendant’s mistake may mean that he did not know the essential accompanying circumstances of his conduct, and so was not intentional or reckless as to them. Simple ignorance⁶⁴ can thus negative the requisite mental element or that foresight of the consequences which the law requires to render the defendant guilty. This is so because ignorance of law is sometimes allowed to produce an absence of mental element. Therefore, as exceptions to the rule that ignorance of the law is no excuse, the insane (section 78(1)), the person intoxicated either from drink or drug (section 79),

⁶⁴ “Simple ignorance is where the mind is a blank on the subject. Mistake is where it is filled with false information.” Williams, *ibid.* p. 75.

and the immature (section 80(1)) all escape responsibility because they have no capacity to understand the law. Further possible exceptions relate to pure accident (misadventure) and irresistible physical compulsion (section 77) and obedience to competent lawful authority (section 83(1)). If a person performs an act on the orders of a competent authority to whom he is lawfully due obedience and if the orders are not manifestly unlawful, that person is protected by section 83.

Why this apparently harsh and dictatorial rule that ignorance of the law is no excuse, a rule which fantastically seems designed to cast upon the individual the duty to know the law, massive and complicated as it is? The following are some of the reasons that have been advanced as justifications for the rule.

First, every person of discretion knows the law because much of the criminal law is based on most people's idea of justice, given that many offences are also moral wrongs. Even in the case of regulatory enactments (e.g. road traffic laws, forestry laws, tax law, and customs law) the ordinary member of the class of people most affected by such legislation has at least a rough idea of its provisions. Ignorance of the law is in itself blameworthy and cannot be encouraged.

Second, no man is to be superior to the law, for if ignorance of the law were recognised as a defence, the defendant's knowledge rather than the law of the land would determine what he could or could not do. Besides, there is no knowing of the extent to which the plea of ignorance might be carried. It would be urged in almost every case, involving the courts in insuperable evidential problems as a result of the extreme difficulty that would arise of trying to prove that the defendant knew the law; it would be difficult to disprove ignorance of the law. This justification for the rule emphasises the principle of legality and the principle of equality of all before the law. These principles preclude anyone from seeking to dodge the law by invoking his ignorance of it. They underscore the need for certainty and uniformity in the administration of the law so as to avoid anarchy.

Third, ignorance of the law can easily be fabricated and would frequently be raised. There would hardly be any defendant who would not plaintively claim that he did not know his conduct was against the law. The plea would in fact encourage violation of the law in the misplaced hope of pleading ignorance of the law afterwards. It would encourage ignorance of the law where knowledge is socially desirable and make it advantageous for people to refrain deliberately from acquiring knowledge of their legal duties.

Fourth, to allow ignorance of law as a defence would be to contradict one of the fundamental postulates of a legal order which is that rules of law

enforce objective meanings, to be ascertained by the courts. The consequence of accepting ignorance of the law as a defence would be that whenever a defendant in a criminal case thought the law was thus and so, he is to be treated as though the law were thus and so, that is, as if the law is actually thus and so. Every person would thus be a law unto himself, infringing the principle of legality and contradicting the moral principles underlying the law.

The rule under consideration has been criticised as not very convincing in that it admits of injustice. For, in actual fact, many people are indeed ignorant of the law. This is particularly the case in developing countries where the following specific sociological conditions are prevalent: high illiteracy rate, ignorance, and inaccessibility of the law. The rule is therefore not absolute and unyielding. It is subject to a number of recognised exceptions.⁶⁵ Among these exceptions one may mention the following:

(i) *Claim of right*. In the law of theft mistake or ignorance of law may create a 'claim of right' thereby negating the requisite intent for that offence. This 'mistake of law' creates a valid 'claim of right' and is a credible defence against a charge for theft. This exception is similar to that of '*bona fide* claim of right' available in some jurisdictions. In terms of that exception a person is not criminally liable in respect of an offence relating to property, if his conduct with respect to the property was done in the exercise of an honest claim of right and without intention to defraud. In some jurisdictions also a defendant whose 'mistake of law' caused him to think he had lawful authority to take and detain a man would not be guilty of kidnapping.

(ii) *Reliance on erroneous advice*. Where erroneous advice is obtained from one charged with administering a regulatory statute, a mistake of law so occasioned is generally held to be a valid defence. This is the position in some American jurisdictions, provided, of course, the erroneous advice is not from one's own lawyer, in which case it will be rejected as a defence. In England, reasonable reliance on erroneous advice from a lawyer or someone in authority can at best be only a factor to be taken into account in mitigation of sentence.

(iii) *Reasonable mistaken belief*. In England, ignorance or mistake of law does provide a defence where it precludes the defendant from having the mental element for the offence charged. Thus a person who discloses protected information in breach of the Official Secrets Act, under a reasonably mistaken

⁶⁵ Loewy AH, *Criminal Law in a Nutshell*, West Publishing, St. Paul, 1975, pp. 130-136; Card, op. cit., pp. 90-91.

belief that it is not protected information under the Act would not be guilty of an offence because he would lack the requisite mental element for the offence.

(iv) *Availability of an express defence of mistake of law.* In some jurisdictions the mental elements in some offences expressly envisage the defence of mistake of law. English theft law stipulates that the appropriation must be dishonest, but it goes on to provide that an appropriation is not to be regarded as dishonest if the appropriator believed he had in law the right to deprive the other of it.

(v) *Non-publication of law.* Since a statute does not come into force until promulgated and published, ignorance of the law due to its non-publication must be a credible defence.

(vi) *Phrases that allow a defence of ignorance of law.* It seems reasonable to say that any intentional offence of false statement lets in a defence of mistake of law, whether worded in terms of falsity, knowledge or wilfulness. Furthermore, phrases like ‘without lawful excuse’, ‘without reasonable excuse’, etc. must surely let in a defence of reasonable ignorance of law.

(vii) *Rule confined to ignorance of the criminal law.* By far the most important limitation of the rule is that it applies only to ignorance of the criminal law. Ignorance of the civil law can be a defence to offences requiring the mental element, because it can negative the mental element. Thus, in charges of crimes against property a mistake as to property right is regarded as pertaining to civil law. So a defence of honesty, or a claim of right, is equally effective whether it rests upon a mistake of fact or on a mistake of the civil law. Furthermore, on a charge of bigamy it would be a defence that the defendant mistakenly but erroneously thought that his first marriage was dissolved by divorce at the time of the bigamous ceremony, when as a matter of civil law the supposed divorce was invalid because it was not pronounced by a court of competent jurisdiction. The law of divorce is not part of the criminal law, so a mistake as to it can be a defence. A claim of right is not a defence in crimes of strict liability.

(viii) *Ignorance of the law is a defence in some countries.* In the Scandinavian countries it seems ignorance of the law is, in varying degrees, a defence. Thus in Norway, for example, a man will not be excused for ignorance of “the general rules of society which apply to everybody” or “the special rules governing business or activity in which the individual is engaged.” But a fisherman need not study the legislation on industry; a servant may be excused

for *bona fide* and reasonable obedience to illegal orders of his master; a stranger may be excused for breaking a rule which he could not be expected to know about; liability may be negated because the legislation is very new, or its interpretation doubtful.

§2. Mistake of fact

A mistake of fact occurs when a person is mistaken in his belief that acts exist when they do not, or that they do not exist when they do. For example, a mistake as to whether a gun is loaded is a mistake of fact. A man who is monogamously married and who goes through a ceremony of marriage with another woman believing that his previous wife was dead makes a mistake of fact.⁶⁶ Ignorance of private rights is mistake of fact and not ignorance of the law.

Mistake of fact may be relevant to criminal responsibility because it can negative the particular mental element necessary to commit a given crime, and thus is an excuse. For example, on a charge under section 352 of kidnapping a person below the age of 18 years, it is a good defence available under the section that the defendant was mistaken (misled) as to the age of the victim. As a matter of policy, mistake of fact must be honest and reasonable. If it is it will negative criminal responsibility, except in strict liability offences where such a defence is obviously unavailable because the language of those offences is such as to reject the defence of mistake of fact.

Cecil Turner refers to two old contrasting English cases, one in which reasonable mistake of fact availed the defendant, and the other in which the mistake did not because there the court applied the old rule of strict liability.⁶⁷ The first case is that of a husband and wife who were visiting a friend's house. The husband discharged the gun he had taken with him for sporting purposes. He set it up in a private place in his friend's house before taking dinner and then going to church. On the journey home in the evening the wife carried the supposedly empty gun part of the way, and it was put in her room at their house. The husband took it up. He touched the trigger and the gun went off killing his wife. It appeared that someone in the other house had found the gun and taken it out shooting and had afterwards returned it loaded to the place from where he had taken it. The husband found the gun there where he had left it. He was acquitted of murder because he had reasonable grounds to

⁶⁶ Consider the story of Oedipus and Jocasta in Greek mythology. Oedipus unknowingly married his mother Jocasta after killing his father not knowing, at the time of the slaying, that he was his father. Son and mother had two children out of that mistaken incestuous marriage.

⁶⁷ *Russell on Crime*, p. 74. The name of the first case is not given but it is reported in Forster's *Crown Law* (Assizes 1745-63), p. 265. The second case is that of *Rampton* (1664) Kel. 41.

believe the gun was not loaded and so did not realise that in handling the gun as he did he was exposing any person to the risk of injury. He lacked the *mens rea* for murder.

By contrast, in *Rampton*, a doubtful decision, a husband accidentally killed his wife by shooting her with a pistol. He had taken all reasonable precautions to ascertain that the pistol was not loaded. Yet the court applied the old strict liability rule and found the defendant guilty of manslaughter.

In *The People v Evaristus Ndong*⁶⁸ Niger-Thomas, J in the Buea High Court found the defendant guilty of indecency in that he had sexual intercourse with an under-16-year old girl contrary to s. 346(3) of the Penal Code, basing his decision on strict liability. The learned Judge expressed his agreement with the prosecuting authority “as to the strictness of liability for sexual and related offences which our local law imposes” and went on to add that “under section 346(3) of the Penal Code ... no excuses of any kind are tolerated.” Similarly, in *The People v Fon Fonwale Dominic* (1987)⁶⁹, Takam, J in the Buea High Court convicted the defendant under s. 346(3) of the Penal Code on the grounds that ignorance of the victim’s age is no defence at law. “The accused who accepts having had sexual relationships with the prosecutrix ... tries to put as a defence, the fact that he was ignorant of the prosecutrix’s age at the time they started. However, even if this were true, it is of little benefit to the accused since ignorance of the victim’s age offers no defence at law.”

It is submitted that *Evaristus Ndong* and *Fon Fonwale Dominic* were wrongly decided on the question whether the s. 346(3) offence is one of strict liability and on the further question whether mistake as to the victim’s age is a credible defence under the section. The following view expressed by this writer elsewhere remains valid.

“In the offence under section 346(3), consent is specifically excluded by the provision. However, the *mens rea* requirement for the commission of that offence is not excluded, so that the accused is liable only if he knew or had reason to know or believe the victim was under the age of 16. In *B (a minor) v DPP*, a 15-year-old boy was charged with inciting a girl below 14 years of age to engage in an act of gross indecency (sexual intercourse) with him. The House of Lords held that the offence was not one of strict liability, albeit that the relevant section does not mention *mens rea*. In the

⁶⁸ (1971-73) UYLR 145.

⁶⁹ Charge No. HCF/26c/87, unreported. If the parents of the prosecutrix fraudulently reduce her age in order to ensure that the defendant gets convicted the courts will not be blind to this fact and will not rely on the bogus birth certificate tendered in evidence: *The People v Achendong Abraham* (1987), Charge No. HCF/41c/87, unreported.

Court's opinion, *mens rea* is a constituent element of an offence, unless Parliament has expressly or by necessary implication indicated otherwise.”⁷⁰

⁷⁰ Anyangwe C, *Criminal Law in Cameroon – Specific Offences*, p. 527. *B v DPP* is reported in [2002] 2 AC 428.

The Mental Elements of an Offence: Non-intentional Fault Elements

The requisite mental element for the overwhelming number of offences in the Penal Code is intention. Section 74(2) declares that criminal responsibility shall lie on him who intentionally commits each of the ingredient acts or omission of an offence with the intention of causing the result which completes the offence. This provision adumbrates two facets of the necessary mental element, namely, intentional conduct, and intentional result (or consequence) of that conduct. Save as otherwise provided by law, intention as to each of these two matters (conduct and result) must be met for any criminal responsibility to arise.

Exceptionally, however, there are a small number of offences in respect of which the requisite mental element is not intention but some other fault element. In some cases the requisite fault element is denoted simply by the omnibus term ‘unintentionally’¹. In other cases the type of fault element is specified. In section 106(5)(6)(7) it is ‘rashly, carelessly, or breach of any regulation’; in section 289(1) it is ‘lack of due skill, carelessness, rashness or disregard of regulation’; in section 228(2) it is ‘rashly’; in section 139 it is ‘negligence’; in section 122(2) it is ‘wilful disregard of law or regulation’; in section 144 it is ‘falsely’; in sections 256 and 259 it is ‘fraudulent means’; and in section 184(1) it is ‘dishonestly’.

Regrettably the use of semantic material of this complexity is without any definitions, for the Penal Code has no definition section. Rashness, carelessness, and negligence² are measures of blame, but they are not precise in scope; nor are there clear standards by which one can be distinguished from the other. Yet, they appear to be used as synonyms in the Code. And if they convey the same meaning one wonders why they are used together in the definition of some offences. Their linguistic association tends to confuse rather than to clarify those concepts. This looseness of terminology could lead

¹ Sections 122(2), 156(4), 278, 279(1), 280, 281, and 290(2).

² For lengthy discussions on recklessness, carelessness and negligence see, Williams G, *Criminal Law – The General Part*, Stevens & Sons, London, 1961, pp. 53-124; Cecil Turner JW, *Russell on Crime, Volume 1*, Stevens & Sons, London, 1964, pp. 41-52; Williams G, *The Mental Element in Crime*, Goldberg’s Press, Jerusalem, 1965; Williams G, *Textbook of Criminal Law*, Stevens & Sons, London, 1978, pp. 42-106; Card R, *Criminal Law*, Butterworths, London, 1995, pp. 70-86.

to looseness of thinking, making it difficult to arrive at a plain conclusion of substance. It is an imperative requirement of public policy that the technical terms of the law should retain unequivocal meanings.

Section 1. Unintended consequence as fault element: ‘unintentionally’

This is a compendious term. Generally speaking, an offence may be committed intentionally or unintentionally. In criminal law the word ‘intention’, as earlier discussed, is used to denote the mental attitude of a person who has resolved to act and to bring about a certain result if he can possibly do so. If the deed which he has chosen to do is one which the law declares to be a crime, he will be held criminally responsible for it because a person who acts and intends a result must necessarily foresee it. A man can foresee more consequences than he intends. But he cannot intend what he cannot foresee.

§1. Meaning of ‘unintentionally’

The word ‘unintentionally’ is used to denote the state of mind of a man who takes an unwarranted risk that produces a consequence which was not intended to happen but was foreseen as probable or could have been foreseen by a reasonable person and yet was not foreseen by this particular person. In law a person is considered responsible for the unintended consequences of his action.

Where a specific non-intentional state of mind is required for criminal responsibility the Code makes that specific mental state part of the definition of the offence. In the definition of some non-intentional offences, therefore, the lawmaker states the precise or specific fault element required for criminal responsibility. Speaking in general terms, it can be said that there are only two specific non-intentional states of mind, rashness and negligence. But the Code does not confine itself to just these terms. The various other terms used include ‘carelessly’, ‘negligently’, ‘wilfully’, ‘falsely’, ‘dishonestly’, and ‘fraudulently’. These terms will later be examined in the context of the offence(s) in which each is used.

By contrast, in the definition of other non-intentional offences the lawmaker simply uses the word ‘unintentionally’ which is a general and less precise fault element, as sufficient for criminal responsibility. Here, since no specific non-intentional fault element is used, the issue of degree of fault remains an open question. It therefore appears to be the logic of the Code that whenever the term ‘unintentionally’ is used as part of the definition of an offence it is immaterial whether the offence was committed rashly, carelessly,

recklessly or negligently. Any of those mental states would suffice for criminal responsibility.

Furthermore, the degree of foresight of probability of consequence is also immaterial. Any departure, however small, from the standard of the reasonable person, suffices to attract criminal responsibility. Where, therefore, the definition of an offence requires that an act should have been committed ‘unintentionally’, or the consequence flowing from an act should have occurred ‘unintentionally’, any non-intentional fault element that causes the act or the consequence of the act will suffice. In a general sense then, rashly, carelessly and negligently are simply species of the same genus, ‘unintentionally’.

§2. Offences in which ‘unintentionally’ is the requisite fault element

A person is guilty of an offence under section 122(2) if ‘by wilful disregard of law or regulation’ he ‘causes *unintentionally*’ any of the prohibited results stated in the section. Under this offence, the conduct, i.e., disregard of law or regulation, is deliberate; it amounts to a high degree of carelessness or rashness, but its result (consequence) is ‘unintended’. To say that the consequence is unintended may, to use precise language, mean that the defendant was rash, careless or negligent. But under the section it is unnecessary to prove the precise nature of the non-intentional fault element. It suffices to show that the consequence was unintentional.

Section 156(4) punishes by life imprisonment the intentional assault upon a public servant resulting *unintentionally* in death. The assault must be intentional but it is sufficient that the consequence is unintentional death. The precise fault element on the part of the defendant in the circumstance of the offence may be rashness, carelessness or negligence, as to that consequence. That is immaterial because the section does not require the prosecution to prove any such specific state of mind in relation to the consequence of the assault. Whether death was foreseen or unforeseen is immaterial. It is sufficient to show merely that the assault resulted unintentionally in death. The situation is the same under section 279(1) which punishes assault upon another unintentionally causing him grievous bodily harm, and under section 278(1) which punishes any assault upon another unintentionally causing his death.

In the crime of ‘assault occasioning death’ under section 278(1), the defendant’s act is intentional but the consequence of the act is unintentional. The use of the word ‘unintentionally’ again suggests that the precise mental state of the defendant is immaterial. He need not have foreseen the likelihood of death, in which case he would have been negligent as to the consequence of

his action (i.e. negligent as to death). His negligence need not be ‘gross’. Of course, evidence that the defendant’s conduct showed disregard for life or the safety of others would strongly point to negligence. If the defendant foresaw the possibility or probability of death, his conduct would have been rash and he would still be accounted guilty of assault occasioning death. Under section 278, so long as it can be shown that the death though unintended followed from (was caused by) D’s intentional conduct he is guilty even if the consequence he foresaw was only some bodily harm. D negligently bumps into P; P falls against Q who is a secret suicide bomber, secretly carrying explosives strapped round his waist, and P is blown up. This is not assault occasioning death by D, for his negligence was only as to the bumping; the bumping was not intentional.

For the crime under section 278 to be consummated it must be shown that the conduct was intentional and the consequence of the conduct unintentional. D’s intention must relate to the conduct and his negligence must relate to the consequence of death.³ Suppose that D by an act of negligence or rashness (or carelessness) cuts P’s finger, and that P, who unknown to D suffers from haemophilia, dies. It is submitted that D is not guilty of assault occasioning death (since the cutting of the finger was not an intentional assault) but of unintentional killing punishable less severely under section 289(1). So also if P, instead of suffering from haemophilia, had negligently introduced filth into the wound and so died of blood poisoning.⁴ The unintentional element in section 278 must be as to death following from the intentional act.

Under section 290(2), driving, and under sections 280 and 281, assault, occasioning simple or slight harm is punishable whether such harm was intended or unintended. Provided the driving or the assault was intentional, it matters not whether its consequence (simple or slight harm) was intentional or unintentional.

Section 2. Course of conduct as fault element: ‘negligently’, ‘carelessly’, ‘rashly’

Unexpected and unpleasant events do happen in life. They are called accidents or misadventures. Some happen not because they are unavoidable or

³ If the assault was ‘unintentional’ from which ‘unintentional’ death in fact followed, that would be a case of unintentional killing punishable less severely under section 289(1), except if it can be shown that it was a case of pure accident or one of irresistible physical compulsion (section 77).

⁴ Williams, *General Part*, op. cit. p. 112.

inevitable. They happen because of the neglect of some precaution that a reasonable person would have used in the circumstances. Such accidents are the product of negligence or of carelessness or of rashness.

§1. 'Negligently'

The term 'negligence' is used in law to denote failure to conform to the standard of care to which it is the person's duty to conform. "It is failure to behave like a reasonable man, in circumstances where the law requires such reasonable behaviour."⁵ Negligence is by definition not a state of mind but conduct. We cannot say the mind is negligent. Rather, it is conduct that may be negligent. However, in relation to the mental element in criminal responsibility negligence is a subjective state of mind involving the negative feature of absence of intention, that is to say it involves an absence of desire of consequence.

Responsibility for some crimes may therefore be incurred by mere negligence to exercise due caution, where the mind is not actively but negatively (or passively) at fault.⁶ The negligence may be as to a consequence or as to a circumstance of one's act. Cases of negligence are those in which the risk of harm taken by the defendant is of such a degree of probability as to be socially unacceptable. Motorists take a risk of accident causing death or damage when they drive. Surgeons and physicians take a risk of killing their patients when they carry out an operation or administer medicine. But the risk in either case is a socially acceptable risk. Driving facilitates the movement of persons, goods and services and is a necessary fact of daily life. Operations and administering medication are done to alleviate suffering or to prolong life. Therefore, neither the motorist nor the surgeon/physician is adjudged negligent by the mere fact of driving a motor vehicle or carrying out a surgical operation, as the case may be. If a person is run over or property is damaged, or if the patient dies, short of proof of rashness or carelessness, the death is accounted as an accident. However, a person who (except in an emergency) undertakes a task that can be safely performed only if he has special skill will be negligent if he does not possess that skill. That is the rationale for punishing unlicensed drivers, incompetent drivers, drivers under the influence of alcohol or drugs, and quack doctors.

⁵ Williams, *Textbook*, op. cit., p. 43.

⁶ The justification for imposing punishment for negligence appears to be that the defendant, by failing to exercise great care, is guilty of moral fault. Implicit in this reasoning is the assumption that the defendant could have prevented the occurrence and that the punishment meted out would positively affect his future conduct in the sense of causing him to act better afterwards, prodding him into improving his standard of behaviour. Punishing negligence is thus seen as a way of conditioning the defendant for the future.

The test of negligence is an objective one. It is the standard of the notional ‘ordinary’ or ‘reasonable’ man.

“The ‘reasonable man’ of the lawyer’s imagining is the prudent, cautious, circumspect, anxiously calculating paragon who is held up by the judges as a model of behaviour. ... *Homo juridicus* is the ideal man, the moral man, the conscientious man – not setting the standard so high that life becomes impossible in ordinary terms, but nevertheless requiring the most careful consideration to be given, so that harm is avoided and the law obeyed.”⁷

It is not, however, in every case that the standard of the notional reasonable man is applied. Children are not subject to the standard of adults; they need show only the standard to be expected of a child of the particular age. The conduct immediately after, of a man who suffers an unforeseeable affliction of a physical character (e.g. he is stung by a bee, or he is given a blow on the head) is not judged by the standard of the reasonable man who has not received a sting or a blow. The standard of the reasonable man is also not applied where a motorist’s driving is affected by the sudden manifestation of the unforeseeable consequence of taking a drug or of an unsuspected neurosis (e.g. carbon-monoxide poisoning while driving; a state of dissociation descending upon the motorist while driving). By contrast, dangerous driving can be committed by reason of the driver’s potentially dangerous physical condition (e.g. drowsiness, dizzy fits, black outs, epileptic attacks), of which he knows or ought to know. In the case of the handicapped person he need only do his best with the body he has. But it would generally be negligent for him to undertake something that could be done safely only by an ordinary man, if he has the opportunity not to do it. The handicapped person who bravely undertakes a task which could be done safely only by an ordinary person could find himself guilty of negligence.

Almost the only crimes in the Code carrying responsibility for negligence *eo nomine* are those in section 139 brought under the common heading ‘negligent custody’. Responsibility for negligence is thus exceptional when it comes to serious crimes. The reason is that it does not seem right to make negligence a serious and stigmatic offence. In the class of offences denoted in the Code as ‘simple offences’ the punishment of negligence is common. But ‘simple offences’ are minor offences and involve no stigma. They are generally

⁷ Williams, *Textbook*, op. cit., p. 43.

punishable by fines or repeated fines so as to prod people into taking care and to make them attend more anxiously to the consequences of their conduct.

Negligence is used as a fault element in the definition of the offences in section 139. The section punishes “any custodian who by negligence permits” the doing of certain prohibited acts. The word ‘permits’ suggests that the prohibited act is done by another, not the custodian who permitted the deed by his negligence. The concept of ‘negligently permitting’ would seem anomalous. ‘To permit’ (or ‘to allow’ or ‘to suffer’ or ‘to cause’) something to be done signifies that the defendant knew or was aware of the conduct in question and intentionally authorised it. ‘Permitting’ is in principle intentional conduct. A man cannot be said to permit what he does not know about. However, the notion of ‘negligently permitting’ is not far-fetched. Generally, the fault element in offences of permitting requires intention (i.e. knowledge or awareness). But sometimes rashness (recklessness, carelessness) or even negligence may suffice.

An offence of ‘permitting’ something can be committed not only by a person who intentionally or rashly, but also by a person who negligently, fails to prevent it where it is his duty to do so. For example, under section 139(1) a custodian negligently permits destruction of any public or protected property under his custody if he fails to realise as a reasonable custodian ought to, that the property in question would be destroyed and so fails to take reasonable steps to prevent this happening, as a reasonable custodian would have. The custodian is punished because he is inattentive to his duty.

Further, the notion of ‘permitting’ something to be done is well capable of covering an omission to prevent it by one who would be legally able to do so. ‘Permitting’ may be by acquiescence, which would be an omission in breach of a duty. Offences of ‘permitting’ something to be done exemplify cases in which responsibility is imposed for omission. Such offences can be committed not only by giving words of authorisation but also by failing to prevent conduct when one is in control of the situation. In fact, in the Code, offences of omission⁸ often involve responsibility for negligence, because the purpose of such offences is that the defendant should move himself to take positive steps to bring about the situation desired by the lawmaker.

It is well to remember that the idea of negligence is included in the broad non-intentional fault element denoted simply as ‘unintentionally’ and that the idea of negligence is capable of being conveyed by the term ‘carelessness’ and also by the expression ‘disregard of law or regulation’ used in the definition of some offences. In section 151(1) the word ‘neglect’ (not ‘negligence’) is used in

⁸ Sections 107, 138, 145-151, 171-175, 179, 180, 228(1), 230(2) and 283.

defining an offence under the section. There, the Code punishes any public servant whose “persistent neglect” is the cause of procrastination etc. ‘Neglect’ (noun) refers to an objective state of the public servant and ‘persistent’ (adjective) to the fault element of the public servant. The public servant would of course be criminally responsible only if his ‘persistent neglect’ was intentional.

The word ‘neglect’ of itself does not point to a state of mind. It indicates only an objective state of fact, a line of conduct. It denotes something which the public servant does not do; it denotes abstention, failing, inattention, forgetfulness. But the word does not tell us the public servant’s motive or reason for the abstention or failing or inattention; nor does it suggest whether or not he foresees any further consequences of his abstention or failing or inattention. A woman who neglects to feed a child may abstain from doing so on purpose (intentional neglect), or she may have forgotten all about feeding the child (negligent neglect). If she neglects intentionally she may have the further intention (i.e. motive) of killing or otherwise hurting the child, or at least she foresees the possibility of the child suffering but could not be bothered (rash/reckless neglect).

§2. ‘Carelessly’

The verb ‘care’ in its dictionary, but not its legal, meaning involves concern, solicitude, or caution. Careless (adjective) is the opposite. It means unconcern in attitude or action. A person who is careless is one who acts with indifference or insufficient attention. Carelessness (noun) is thus sometimes used in law as a synonym for negligence.⁹ It has come to mean objective negligence, i.e., the characteristic of a person whose behaviour does not tally with the conduct of the reasonable man, even though he was doing the best that he could, and cared a great deal.

Legally, therefore, carelessness can be committed not only by those who could not care less (i.e., completely indifferent) but also by those who care deeply. A man may take all the care of which he is capable, and yet be accounted negligent for failing to reach the objective standard of the reasonable man. He may honestly believe his conduct does not imperil anyone. But he may be held to have been negligent in arriving at that belief. An incompetent driver may be convicted of ‘driving without due care and attention’ (i.e. carelessly) even though he was doing his level best.

⁹ The coupling by lawyers of this noun with the adjective ‘inadvertent’ yields the neologism ‘inadvertent negligence’, that is to say ‘unconscious negligence’.

Ordinarily, a careless person is one who does not take the care he ought to take. Legally, he is one who cares less (he does not think of the result which his conduct might produce), or who cares very much and does the best he can but by some clumsiness or failure of foresight brings about a result he would have liked to avoid. He is criminally responsible because he is morally at fault in being clumsy or in failing to contemplate the particular consequence which is in question. Carelessness and negligence tend to be used as interchangeable words.

Section 106(5) and (6) punish anyone who “by rashness, carelessness, or breach of any regulation” permits etc. Under section 106(7) the service controller or the agent of a service provider commits an offence if he “causes the service to fail or to be delayed, be it merely by carelessness.” It is an offence under section 289(1) to cause death or serious bodily injury “by lack of due skill, carelessness, rashness or disregard of regulation.” In any of these cases, carelessness alone suffices to attract criminal responsibility.

It is the case that under sections 106(5)(6) and 289(1) the expressions ‘rashness’, ‘carelessness’, ‘lack of due skill’, ‘breach of any regulation’, and ‘disregard of regulation’ are used as legally synonymous. ‘Lack of due skill’ suggests clumsiness and imports the idea of negligence. ‘Carelessness’ means lack of necessary care. ‘Rashness’ means imprudent, foolish or senseless conduct. ‘Disregard of regulation’ means failure to act according to or to obey regulations. This last expression is not a mental state but an objective state which may be brought about intentionally, recklessly or negligently. The reason for lining up these four expressions one after the other as part of the definition of the offences in the section appears to be to indicate that the law is indifferent as to which of the specified non-intentional fault element caused the prohibited consequence. In order to secure a conviction the prosecution need only prove one of those fault elements. Since under the sections, a person is liable for carelessness or negligence (the lowest fault element), he is *a fortiori* liable for rashness; and being liable for rashness, he is *a fortiori* liable for intention. The idea of rashness as ‘gross negligence’, as it is known in some jurisdictions, signifies that rashness is an extreme departure from the standard of conduct of the reasonable man.

Sometimes the law imposes responsibility for carelessness (negligence) as a way of enforcing certain rules of prudence that in themselves, have no legal force, for example handling firearms at a funeral ceremony, driving carefully. It is not a rule of law, but one of prudence only, that one must not point a gun and pull the trigger. But a court would nevertheless act upon it even though it is not technically a rule of law. Similarly, it is not a rule of law but merely one of prudence that the driver of a motor vehicle, while driving, must not read,

say, a newspaper, use his cell phone or ‘tablet’, pass on a blind corner, or even drink. In practice, the courts punish such conduct as tantamount to driving without due care and attention.¹⁰

The Code contains a number of motoring offences. Section R. 369 (1) punishes what is there denoted as “excessive speed” and “bad driving”. The driver of a vehicle may thus be booked for ‘speeding’ or for ‘excessive speed’. But that expression is unhelpful. It is nothing but a tautology because ‘speeding’ or ‘excessive speed’ means no more than that the driver ought not to go at a speed at which he ought not to go. In some countries certain stretches of the highway have a speed limit and are monitored by speed cameras. The motorist who exceeds the sign-posted speed limit may be stopped and ‘booked’ on the spot or ‘booked’ electronically for excessive driving. That technology has not yet got to these shores. When therefore the road traffic ‘cop’ in this country stops a motorist and ‘books’ him for ‘speeding’ in contravention of section R 369(1) of the Penal Code the claim is at best speculative and the ‘booking’ indefensible in law.

Section 228(2)(d) punishes the motorist who drives “rashly and in a manner liable to cause harm to any person.” It is an offence under section 228(3) for any person to drive any vehicle “when drunk or under the influence of drugs.” And if driving when so drunk or drugged the person causes death or bodily injury he will be guilty of an offence under section 290(1)(a). The unlicensed driver and the hit-and-run driver are caught by section 290(1)(b)(c) and (4). It is an offence under section 289(4) for the driver of a vehicle to cause death or personal injury by lack of due skill, carelessness, rashness or disregard of regulation.

§3. Rashly

The highest and the lowest fault elements for criminal responsibility are, respectively, intention and negligence. Generally a man is criminally responsible for the intentional result of his intentional conduct. In some cases a man is also criminally responsible for the unforeseen consequence of his conduct where the law deems that he ought to have foreseen such a consequence but he failed to do so. Between these two extreme fault elements is the situation of the man who consciously undertakes a risky conduct, foresees the consequence of that risky conduct but decides to risk it hoping that it might not occur or being indifferent as to whether it occurs or not. It is normally the case that a person who consciously takes an unjustified risk foresees the consequence of the risk he is taking but does not care whether or

¹⁰ Variouslly denoted in ordinary usage as ‘careless driving’, ‘dangerous driving’, ‘reckless driving’, or ‘rash driving’.

not it materialises, or he hopes that it will not materialise. The consequence is foreseen as possible or probable but not desired.¹¹

The precise nature of the foresight that a person might have may vary. A person may foresee a criminal consequence as only a remote possibility. But if he foresees the consequence as certain to happen, he would be taken to have desired it and therefore intended it. Between these two poles of the degree of foresight of consequence of the risk (mere possibility at one end; and certainty at the other end) is a whole range of foreseeable possibilities. A consequence may be described as barely possible, quite possible, really possible, just probable, probable, highly probable, or virtually certain. For rashness (subjective recklessness) the risk which must be foreseen need only be a *possible* risk. If the risk of the consequence in question was virtually certain or highly probable and the defendant still took it that would strongly suggest he intended that consequence. To that extent, intention and rashness overlap.

In the literature, various terms are used to describe this intermediate situation: recklessness, rashness, and carelessness. ‘Recklessness’¹² is the terminology used in common law jurisdictions and, in England in particular, the term has given rise to much judicial and academic learning.

“Differing from intention, yet closely resembling it, there are two other attitudes of mind, either of which is sufficient to attract legal sanctions for harm resulting from action taken in obedience to its stimulus, but both of which can be denoted by the word ‘recklessness’. In each of these the man adopts a line of conduct with the intention of thereby attaining an end

¹¹ A person might be a dumb or a twit and therefore incapable of foreseeing what a normal person would foresee. On principle, evidence can be adduced to show that such a person is backward in intelligence, for the purpose of persuading the court that he did not foresee a consequence that a normal person would have foreseen.

¹² In England, following the House of Lord’s decision in *Caldwell* [1981] 1 All E R 961, ‘reckless’ now bears two different legal meanings, subjective recklessness and Caldwell-type recklessness. The two types of recklessness have in common the fact that they are both concerned with the taking of an unjustified risk. “A person acts with subjective recklessness as to a *consequence* of a deliberate act of his if, when he carries out that act, he actually foresees that there is a risk that that consequence may *possibly* result from his act and in all the circumstances it is unreasonable for him to take the risk of it occurring. ... A person acts with subjective recklessness to a circumstance of his act if, when he carries out that act, he actually realises that the circumstance may possibly exist, provided it was unjustifiable for him to take the risk of its existence. ... A person is Caldwell-type reckless as to a particular risk which attends his conduct if that risk is obvious and either (a) he has not given any thought to the possibility of there being any such risk; or (b) he has recognised that there is some risk involved and has nevertheless persisted in his conduct.” Card, *Criminal Law*, pp. 71-73. In the quote (a) is an objective, and (b) a subjective, formulation of Caldwell-type recklessness. *Caldwell* is not law in this jurisdiction. Accordingly we shall stick to the pre-*Caldwell* legal meaning of recklessness, that is to say, recklessness (where it suffices for an offence) in its subjective sense.

which he does desire, but at the same time realises that this conduct may also produce another result which he does not desire. In this case he acts with full knowledge that he is taking the chance that this secondary result will follow. Here, again, if this secondary result is one forbidden by law then he will be criminally responsible for it if it occurs. His precise mental attitude will be one of two kinds (a) he would prefer that the harmful result should not occur, or (b) he is indifferent as to whether it does or does not occur. Whichever it may be the common law makes no distinction in his liability. It is unfortunate that there is no English term that exactly fits this situation, and for want of a better, the word 'recklessness' has to be employed. ... [T]he reckless man is one who, while aiming at an end which he desires to attain, consciously takes the risk of bringing about some other result also. ... [A] man who intends to produce a result both foresees it and wills it; whereas a man who merely takes the chance of producing the result may hope that it will not follow, or may be indifferent as to whether or not it will follow. But whether a man intends to do harm, or whether he is content to take the chance of doing it, he does foresee it, and there is equal justification for holding him responsible under the criminal law. That there must be moral blame in both cases can hardly be denied; the victim of the mischief needs such protection as the law can give in either case; and since selfishness and indifference to the welfare of others are considered to be more common failings than active malevolence it would seem arguable that any power of repression which a rigorous application of law can exert should be brought to bear upon them.”¹³

'Recklessness' therefore involves something more than mere consciously taking a risk. It includes carelessness and inattention and is therefore a more emphatic word of condemnation. It is negligence with awareness of the possibility of a consequence or circumstance. It is the conscious and unreasonable running of risk. For that reason 'recklessness' is sometimes denoted as '*advertent negligence*' (i.e., negligence to which a person has directed his mind). Negligence itself does not involve foresight. It is simply the unintentional failure to conform to the standard of conduct of the reasonable man in respect of the consequence in question. There is failure to direct one's mind, when a reasonable man would have directed it, to the consequence in question. This negative state of mind is therefore sometimes denoted as

¹³ Cecil Turner, *op. cit.*, pp. 41-43. Turner informs us that the attitude of the reckless man corresponds to the *culpa lata* of Roman law which carried the same liability for resulting harm as did *dolus malus* (evil intention).

*'inadvertent negligence'*¹⁴ (i.e., negligence to which a person has failed to direct his mind). In many cases involving negligence or recklessness the criminality of highly risky behaviour turns on whether it has actually caused the untoward consequence that it portends.

The Penal Code shuns the word 'recklessness', preferring instead the term 'rashness'. But 'rashness' is not free from ambiguity. It is completely out of use as a legal term of art in the criminal law of common law jurisdictions and there is no authority on its meaning. The Code also employs another term, 'carelessness'. This word too is hardly in use in the criminal law of common law jurisdictions and, like other terms in the Code, is not defined. However, the way the Code uses the two terms would seem to suggest they are conceived as synonyms. Analytically, rashness is the semantic equivalent of recklessness. And since rashness and carelessness appear to be used in the Code as interchangeable terms it means all three words, rashness, carelessness, and recklessness (in the subjective sense of the defendant's actual mental state) are treated as equivalent terms. In fact, etymologically, recklessness and *carelessness* mean the same. Both refer to the quality of not caring, not recking (i.e., not having any regard for danger or consequences).

“From the etymology of the word ‘recklessness’, a man who is reckless is literally a man who does not reck, that is to say one who does not care; on this line of reasoning, recklessness and carelessness become synonymous. This would matter little if ‘carelessness’ kept its primary meaning of one who does not care, but in fact ‘carelessness’ has come to be applied to persons who may care very much about the harmful result of their acts but are constitutionally incapable of preventing those results. It is only too easy for this widened meaning of ‘carelessness’ to infect the word ‘recklessness’.”¹⁵

¹⁴ This somewhat confusing semantic exercise drew the following caustic remark from Cecil Turner (op. cit., p. 45). “The phrase ‘inadvertent negligence’ necessarily involves the conception of ‘advertent negligence’, which, we are told, has the special name of ‘recklessness’. On this conspectus of the situation the noun ‘negligence’ seems to have no meaning of any value in law: it cannot mean ‘inadvertence’ for if it did the adjective inadvertence would be misleadingly pleonastic; while to suggest that it could mean advertence would make nonsense of the phrase.”

¹⁵ Williams, *General Part*, op. cit., p. 54. Persons who may be constitutionally incapable of preventing the harmful result of their acts would include the man with a bad memory, the man prone to accident, the man with an innate temperament, the man who is impulsive, the man who is dull in mind, the man who is selfish, the man who is clumsy, the man with a slow reaction-time in emergency situations.

There are only a few offences in the Code in which rashness, specifically, suffices for criminal responsibility. In some such offences the rashness is as to the consequence flowing from the act¹⁶ and in others it is as to a requisite circumstance of the act or as to some other risk¹⁷. The rash person under section 289 is criminally responsible because he foresees that death or personal injury, as the case may be, would possibly result from his deliberate conduct. He is criminally responsible under section 228(2) because he unjustifiably takes a risky activity actually realising the existence of possible risk of harm to another. In both cases the law penalises the ensuing death or personal injury or risk of personal injury. Here the test of rashness as a fault element is subjective.

A person is rash when he carries out a deliberate act knowing that there is some risk of evil happening from that act but nevertheless unjustifiably¹⁸ continues in the performance of that act. Rashness suggests an indifference to risk where the accused foresaw the risk but hoped to be able to avoid it. A rash person would nearly always prefer to be law-abiding (or semi-law-abiding) than otherwise. If he is rash as to killing or injuring somebody, he would still prefer not to kill or injure, if given the choice. By definition he does not want to kill or to injure. He merely wants to do something else that involves the risk of killing or injury. He may make some effort to avoid the risk eventuating, and yet can be found to be rash. Most rash people run the unjustifiable risk only because it is inseparable from the achievement of their purpose. Rashness as to a circumstance is often easier *to prove*, but rashness as to consequence may well be more difficult to establish. This is because rashness may be a mere passing realisation in the mind of the accused and so makes no mark on his conduct.

Section 3. Deception as fault element: ‘dishonestly’, ‘falsely’, ‘fraudulently’

Generally, these words are used as semantic equivalents. They denote deception. They import not just a course of conduct but the requisite fault element. Whenever each of these terms is used in the definition of an offence, the law is in fact penalising overt preparations for deception, usually involving

¹⁶ Section 289.

¹⁷ Section 228(2).

¹⁸ Taking a slight risk that any ordinary reasonable person would have taken would not be reckless. Running a justified risk to avert an emergency would not be regarded as recklessness. Every surgeon foresees the risk of the death of the patient upon whom he is operating but, unless he takes an unjustified risk, he cannot be regarded as being reckless as to the patient's death.

a false instrument. Mere preparation for crime is generally not punishable (section 94(3)), except in isolated cases. The isolated cases relate to forgery and certain other kinds of deception-offences which are punishable out of social and commercial necessity. Many examples come to mind. A person takes or keeps property *dishonestly* to deceive others that the property in question is his and thereby fraudulently induces others dealing with him to so consider that property. A person falsely makes or alters an instrument so as to deceive the unwary person that the instrument is genuine or authentic. The medical practitioner falsely certifies a medical condition or situation so as to deceive and mislead. A person uses fraudulent means to cause an artificial increase or decrease in prices so as to disrupt market forces and create fictitious prices.

§1. 'Dishonestly'

To be dishonest is to be false, deceitful or fraudulent. In England (and there is no reason why the same should not apply here), the test of dishonesty is first an objective one and then a subjective one. The objective test looks at what, going by the standards of ordinary decent people, would be considered as dishonest. The subjective test considers whether the defendant realised that his conduct would be considered dishonest by ordinary decent people. It is an offence under section 184(1) for any person to take or keep 'dishonestly' any property. Under that section therefore, if ordinary decent people would not consider as dishonest the defendant's action of taking or keeping the property in question the matter ends there and the defendant must be acquitted. But if the defendant's conduct would be considered dishonest by those people it would then have to be determined whether the defendant must have realised that what he was doing would be considered dishonest according to the standards of ordinary decent people. If he did not realise this, then his conduct would not have been dishonest; if he did he would have been. If the defendant's conduct is obviously dishonest in the eyes of ordinary decent people he would have a hard time trying to convince the court that he did not know that ordinary people would consider his conduct dishonest.

§2. 'Falsely'

Section 144 makes it an offence for anyone within the class of persons stated in the section to "*falsely*" make or alter any instrument. It is not enough to show merely that an instrument was made or altered. It is not an offence to make an instrument. It is not an offence to alter an instrument. It is the *false* making of an instrument, the *false* alteration of an instrument that is penalised. It must therefore be shown that the making or the alteration, as the case may be, was false. The false making or alteration of an instrument suggests that the

making or alteration was by a person other than the proper person who should have done so. The person who made or altered the instrument was a 'fictitious person' or a person falsely assuming an attribute. He made (or altered in any respect) the instrument purporting to be a person who in fact did not make it in that form or on those terms (or did not alter it in that respect). He made the instrument in the form or terms in which it is made (or altered it in any respect) purporting to be on the authority of a person who did not in fact authorise its making in that form or in those terms (or the alteration in that respect).

Section 259 penalises false medical certification by a member of the medical profession. The falsity here relates to the fact that the certification is not honest, with the result that the certificate tells a lie. Under the section the person who certifies is not a quack and the certificate itself is not a fake. What is in fact penalised is the dishonesty of the medical practitioner in making an untrue certification. The conduct of the member of the medical profession is dishonest, it is fraudulent. As a consequence what is vouchsafed in the certificate is false in part or in its entirety.

§3. 'Fraudulently'

By section 256 any person who by any "**fraudulent means**" causes an artificial increase or decrease of the price of goods etc. is guilty of an offence. The words in quotation marks mean 'by deceitful means'; by means intended to deceive somebody, usually in order to make money.

The Physical Elements of an Offence

The expression ‘physical elements of an offence’ is a compendious and descriptive term that refers to the whole definition of the offence charged, excluding the defendant’s state of mind. It may consist of an act, or sometimes other conduct such as an omission or a passive state of affairs, or sometimes again of even a mere bodily position¹. Also forming part of the physical elements of an offence are any legally-relevant surrounding circumstances² and any prohibited consequences, which are indicated by the definition of the offence. We may, as a convenient shorthand conceptualise the physical elements of an offence as involving conduct on the part of the defendant that is prohibited by the criminal law, the word ‘conduct’ being understood as a flexible term that includes an act or an omission or a bodily position, in legally-relevant circumstances and/or resulting in prohibited consequences.

Section 1. Act and omission

It is practically impossible to know what is going through a person’s mind even if he ‘confesses’, for the confession may in fact be false. A person cannot therefore be punished merely on the assumption that he has a criminal mind. Nor can he be punished for mere criminal fantasies which he may in the end lack the resolution to put into effect. As G Williams points out³ modern law has no place for George Orwell’s ‘thought-crimes’ or for the Biblical adultery-in-his-heart⁴ offence. So, a person may harbour a dangerous or wicked or criminal intention. But until he translates or at least begins to translate that intention into practice the law will not hold him criminally responsible. The law intervenes only when the man with such an intention begins to put it into execution. In a number of instances the slightest manifestation of the criminal intention evidenced by some act suffices for the law to intervene. Words alone are sufficient in conspiracy, sedition, accessoryship, and defamation;

¹ An example is the case of being found in certain places for an unlawful purpose.

² Such as time, place or status but not any defence or the defendant’s state of mind.

³ *Textbook*, p. 31. In *Nineteen Eighty-Four*, a novel written by George Orwell (real name: Eric Arthur Blair) and first published in 1949, the Thought Police of an imaginary country could arrest anyone guilty of merely thinking of committing an offence.

⁴ Matthew 5:28, “But I tell you that anyone who looks at a woman lustfully has already committed adultery with her in his heart.” And a woman who looks at a man lustfully?

commencement of execution manifesting an irrevocable intention to commit an offence suffices in attempt; possession of something in defiance of the law suffices in ‘possession’ offences⁵; a bodily position or a state of affairs beyond the control of the defendant suffices in certain offences.⁶

§1. Act

An act is a willed muscular contraction or bodily movement.

“Lawyers sometimes speak of a voluntary act meaning only that it was willed. Since every act is by definition willed, there is no need to call it voluntary. The element of volition in an act has greatly exercised the philosophers. I can look to my hand, say to myself, ‘Hand, move to the left,’ and then cause it to move to the left. But that is not the way I usually live and move: I do not consciously direct orders to my muscles. ... Certainly it would be false to assume that every act is the result of deliberation: I may scratch my nose while thinking, without knowing I am doing it or recollecting I have done it. Even when the act is conscious, introspection does not show a conscious exercise of will preceding conduct. When I move my arm, say in writing a letter, I do not consciously decide to move them before moving them. It is true that electrical impulses run from the motor nerve cell in the spinal cord through the nerve fibres to the muscles; and these muscles are under the control of my brain. But the mental functioning that controls movements is not conscious determination, and it takes place at practically the same time as the movement. Will is the mental activity accompanying the type of bodily movement that we call an act. It is, of course possible to will the absence of an act, as when we sit still. A bodily movement is said to be willed, generally speaking, when the person in question could have refrained from it if he had so willed, that is, he could have kept still. Movements that are the result of epilepsy, for example, are involuntary or unwilled because the person concerned cannot by any mental effort avoid them. Whatever the difficulties in explaining what we mean by volition, everyone realises the important difference between doing something and having something happen to one; and this distinction is a basic postulate of a moral view of human behaviour.”⁷

⁵ Examples are the offences under sections 212, 213, and 248.

⁶ One such offence is that under section 247.

⁷ *Textbook*, pp. 33-34.

X acts volitionally if he swings his arm and in so doing hits Y even if he does not know Y was standing anywhere near him. Lack of mental element (the intention to assault Y) would be a credible defence here, but not lack of an act (the willed or voluntary bodily movement that hit Y). Similarly, if A threatens to blow off B's head unless he shoots C, B's subsequent shooting of C is voluntary, a willed act, though here B may avail himself of the partial defence of threat or moral compulsion.⁸ On the other hand, if hurricane-force winds propel X unto Y, there is legally no assault on the part of X. The law is the same if A pushes B against C. In both cases there is no willed or voluntary act on the part of X or B. The requirement that an act must be voluntary has the consequence that the automaton, the epileptic, the sleepwalker (somnambulist) and the hypnotic cannot be accounted criminally responsible for their involuntary or unwilled movements.

The common basis of most crimes in the Penal Code is the commission of some prohibited act. Often, the prohibited act is precisely defined; but sometimes it is not, as where the Code uses words which comprise two concepts, that of an act and that of a consequence flowing from it. For example, murder is defined in section 275 simply as "causing another's death". The act causing the death is left undefined, meaning that any act which results in the death of another will suffice. Likewise, the Code in section 141 punishes any public servant who obstructs the exercised by a citizen of his electoral rights and section 230 punishes anyone who without lawful authority obstructs the use of any public highway or waterway. Any of these offences may be committed by any act which results in 'obstruction'.

§2. Omission

An omission is a not-doing, a failure to act or an abstention where there is a legally-recognised expectation (duty) to act. Whenever the charge alleges that the defendant failed to do something (i.e. failed to act) the court has to ascertain, from the requirement of the express terms of the offence or by judicial construction of commission by omission, whether the defendant was under a legal obligation to act but breached that duty. If this is established the defendant is held responsible for failing to act. In *Speck*⁹ X was charged with committing an act of gross indecency with an 8-year-old girl. The girl placed her hand on X's trouser over his penis. He did not remove the girl's hand resulting in an erection. Held, that X was guilty of gross indecency when he failed to prevent the child doing such an act with him. According to this decision permitting gross indecency is an 'act' of gross indecency. The basis

⁸ Section 81.

⁹ [1977] 2 All ER 859.

for penalising the conduct in this case appears to be that X by his conduct in failing to prevent the little girl from placing her hand over his penis constituted an invitation amounting to an ‘act’ of gross indecency.¹⁰

But liability based on an omission to act may sometimes even arise where the offence is one which is generally incapable of judicial construction as commission by an omission.

“This is the situation where the accused inadvertently and without the appropriate [state of mind] does an act which puts a person or property in danger but before the resulting harm is complete he becomes aware of the train of events caused by his act. In such a situation the accused is under a duty to take such steps as lie within his power to try to prevent or reduce the risk of harm. Consequently if, before the harm resulting from the accused’s act is complete, he realises what he has done and fails to take such steps to prevent or reduce the risk, and provided he then has the relevant [state of mind], he will be criminally liable.”¹¹

In *R v. Miller*¹² Z fell asleep while smoking. He woke up to find the mattress smouldering. But he simply moved to another room to resume his slumbers. The house caught fire. The defence was that the fire had been started accidentally. Z was convicted of arson.¹³ His appeal to the Court of Appeal failed and further appeal to the House of Lords fared no better. In dismissing the appeal the House of Lord opined that Z was in breach of a duty when he failed “to take measures that lie within his power to counteract the danger that he has himself created.” In the view of the House a person would commit the physical ingredients of arson if, having accidentally started a fire which created a risk of damage to property, he became aware of what he had done before the resultant damage was complete but failed to take steps within his power to prevent or reduce the damage to the property at risk.

The Penal Code seems primarily concerned with a positive act as a basis for criminal responsibility and is generally reluctant to punish mere omissions. This does not mean that the Code does not punish omissions. In a fairly large number of cases the Penal Code imposes duties to act and punishes failure to

¹⁰ Conduct of this nature falls within the terms of section 344 of the Penal Code which makes it an offence for anyone to excite, encourage or facilitate the debauch or corruption of a person under the age of eighteen years.

¹¹ R Card, *Criminal Law*, op. cit., p. 57.

¹² [1983] 1 All ER 978, HL.

¹³ Arson is an offence under section 227 of the Penal Code.

do so. The Code does so by expressly creating culpable-omission offences, i.e., defining some crimes in such a way that mere failure to do something, or a mere passive state of affairs (inactivity or abstaining from doing something), is criminal. The definition of omission offences actually specifies a failure to act, using not the word ‘omission’ but words such as ‘fails’, ‘abstains’, ‘declines’, ‘refrains’ and even an active verb like ‘to permit’.¹⁴ Construing an active verb as importing the notion of an omission might seem odd, but there is at least one instance in the Code¹⁵ in which liability for omission may arise in the form of negligently permitting another to perform some criminal act. Here ‘permitting’ arises because there is a failure to discharge a duty or exercise an authority to control the act of the other so as to prevent the commission of the offence. The permitter in this case is the principal offender. However, if the permitter’s conduct is construed as amounting to passive assistance to or encouragement of the other person, then he becomes liable as a secondary party, an accessory¹⁶.

The circumstances in which the Code punishes criminal omissions are varied, but generally they are concerned mainly with duties to avoid risk of serious harm and duties not to refrain from doing some act legally required to be done by virtue of a relationship based on status, contract or tenure of public office.¹⁷

Responsibility for omission in the Code is predicated upon the following formal sources of duty:

¹⁴ Interestingly, there are a few English decisions holding that offences are capable of being committed by omission although the relevant legislation may not so provide. In *Stunt v. Bolton* [1972] R.T.R. 435 it was held that a person could ‘obstruct’ a constable by refusing to hand over car keys when he had a duty to do so. Similarly, it was held in *R v. Yuthiwattana* (1985) 80 Cr. App. R. 55 that a landlord could do an “act calculated to interfere with the peace and comfort” of his tenant by failing to provide him with a duplicate door key.

¹⁵ Section 139.

¹⁶ Section 97.

¹⁷ The law may impose a duty predicated on a status relationship (husband-wife, parent-child), a contractual relationship (doctor, nurse, babysitter, driver, public servant, swimmer hired as a life guard), a duty voluntarily assumed (the volunteer babysitter or rescuer, fishermen or hunters or mountaineers in a place isolated from all other aid, the residential occupier who invites guests to his premises), the need to act created by defendant’s criminal conduct (person who creates a risk or danger for another and then intentionally refrains from saving him), negligent omission (those handling fire and explosives), neglect to report or to prevent a felony (misprision of treason), a general civic duty imposed on all persons to assist others according to their abilities (failure to render assistance to any person in danger of death or grievous harm), an obligation to preserve life, a voluntarily assumed undertaking to care for another who is unable to care for himself such as a child, an elderly person, a handicapped person or a patient.

(i) *A general civic duty: (a) on all citizens to report certain activities; and (b) on all persons to assist others in peril, without risk to themselves or others.* Section 107 (failure to report) casts a general duty on all citizens to report in time of peace any activity liable to injure the defence of the nation. It is an offence under section 283 (failure to assist) for any person to fail to render assistance to a person in danger of death or grievous harm, whether by his own endeavours or by calling for help, where such assistance involves no risk to himself or to any other person. Section 283 encapsulates a general duty of rescue or assistance. The classic case is the duty of family members, based on the principle of mutual support and reliance: spouse, parent, guardian, and child. Another basis for the duty in this case is that the presence of another family member in the household often has the effect of shielding the victim from possibilities of outside assistance. Section 283 would extend, on the basis of mutual reliance in an emergency, to voluntary partners in hazardous enterprises such as mountaineers climbing the Fako Mountain or a group of sportsmen white-water rafting on the Cross River in Mamfe. The section may however cause some difficult problems particularly for the medical profession.

(ii) *A duty (based on negligence) on any person who creates a risk of bodily harm to another to ensure he provides against such risk.* Section 228 (dangerous activities) punishes in subsection (1) any person who fails properly to provide against risk of bodily harm to any person from his dangerous activities. The section punishes creators or controllers of dangerous activities. Here there is combined in a single course of conduct an antecedent act (dangerous activities, i.e., reckless endangerment) and a subsequent omission (failure to provide against risk of bodily harm).

(iii) *A public-service duty on public servants not to refrain or abstain from performing legally required acts of their office.* It is an offence under section 138 (failure to report deficiency) for any public servant having knowledge of any cash or book deficiency in the account of a public official under his orders or supervision not to report the deficiency to the appropriate authorities or to his immediate superior. It is also an offence under section 145 (failure to suppress riot) for any public servant who, having the power, the duty and the means so to do, refrains from dispersing a riot. Similarly it is an offence under section 146 (failure to protect private rights) for any public servant who, having the power, the duty and the means so to do, refrains from preventing the use of force against any person, or his deprivation of liberty or any obstruction to the exercise of his civil rights. Furthermore, it is an offence under section 147 (denial of justice) for any person exercising judicial functions to decline, after

having been duly moved in that behalf, to issue a decision. A public servant, notary public etc is guilty of an offence under section 148 (refusal of service) if, after having been lawfully required, refrains from performing any act of his office. A registrar of births, marriages and deaths commits an offence under section 150 if he fails to enter any of those events in the appropriate register. Any public servant who persistently fails in performing any duty of his office is guilty of an offence under section 151 (persistent neglect).

(iv) A general duty by all persons in certain cases, and specified type of persons in particular circumstances, to assist justice. Any person who being able so to do by his own immediate action and without risk to himself or to any other person, refrains from preventing the commission of any felony or misdemeanour against the bodily integrity of any person, is guilty of an offence under section 171 (non-intervention). It is an offence under section 172 (refusal to clear) for anyone who, being able so to do without incriminating himself, his spouse or other close relative, refrains from communicating to the judicial or police authorities evidence of the innocence of any person in custody awaiting trial for felony or misdemeanour. By section 179 (custody of minor), whoever fails to surrender a minor to the person to whom his custody has been granted by order of a court is guilty of an offence. Similarly, a person who lets pass two months without paying in full any maintenance which he has been ordered by a court to pay to his spouse, ascendant or descendant, commits an offence against section 180 (maintenance). Section 355 (failure to return a child) punishes anyone who being in charge of a child fails to return him to those having the right to claim him back. A person regularly summoned as a witness is guilty of an offence under section 173 (defaulting witness) and any person summoned as juror or assessor is guilty of an offence under section 175 (defaulting juror or assessor), if any of them without just cause fails to appear or to take oath or to affirm as required by law. Any person whose assistance has been regularly required as an expert, medical practitioner or interpreter by any judicial or legal authority and who without just cause refuses to furnish it, is guilty of an offence under section 174 (defaulting expert). It is also an offence punishable under section 176 (false excuse) for a witness, expert, juror or assessor to falsely excuse himself.

(v) A contractual duty on any custodian or any road repair contractor to be attentive to their duties. A custodian is under a duty, breach of which is punishable under section 139 (negligent custody), not to negligently permit destruction, defacement or abstraction of any property. Section 230 (public highway)

punishes under subsection (2) anyone who being bound to repair any public highway or any work connected with it, refrains from doing so.

Section 2. Events and surrounding circumstances

§1. Events

The physical elements of an offence may consist of simply a bodily position. In other words, an offence may be defined as simply requiring the occurrence of an event in which the defendant is involved or simply requiring the defendant to be *found* in a certain situation, no act or omission on his part being required. A few examples would suffice to illustrate the point. Under section 290(1) the driver of a motor vehicle is guilty of an offence if he is “drunk or drugged” while driving; or if he has not got the licence required for driving the vehicle in question. It is worthy of note that what constitutes the offence is not that there is something wrong with the person’s driving. What constitutes the offence is simply the fact that the person in question was found in a situation where he was drunk (not that he was drinking), drugged (not that he was taking drugs), or without the requisite driving licence (not that he did not obtain a driving licence). Another example is provided by section 247(1) whereby it is an offence to be found in a public place being of no fixed abode and with no means of support. It is an offence under subsection (2) of the same section for any person in a public place and having no fixed abode and no means of support to be found having in his possession any weapon or any instrument with which an offence may be committed. These are situational offences.

§2. Surrounding circumstances

The requisite circumstances of the prohibited conduct are not the same for all offences; they vary from offence to offence. For example, the circumstances in which the offence of bigamy must occur are that the person must have been already married; the circumstances in which rape occurs are that sexual intercourse must have been with a female person who does not consent. Where surrounding circumstances are included in the definition of an offence the effect is that they form part of the physical elements of the offence and must also be proved.

Section 3. Legally-relevant consequence and the problem of causation

§1. Consequence

The definition of the more serious offences requires the defendant's conduct to cause a particular legally-relevant consequence. In homicide, for example, death must result from the defendant's conduct. In the offence denoted as simple harm (section 280) the assault upon another must result in sickness or inability to work lasting more than thirty days. In the offence of rigging prices (section 256) an increase or decrease of price must result from the fraudulent means resorted to by the defendant. In section 160 the consequence of the interference or threat must be that the public servant performs an act of his office improperly or refrains from performing an act of his office. In theft *simpliciter*, the removal of another's property must result in loss to that person (section 318(1)(a)). In misappropriation, the destruction, waste or conversion of the property entrusted to the bailee must result in loss to the bailor (section 318(1)(b)). In false pretences the deceit must result in loss to the person deceived (section 318(1)(c)). In all such cases the requisite legally-relevant consequence is part of the physical elements of the offence and must then be proved.

Offences requiring a consequence to result from the defendant's conduct are sometimes referred to by academic writers as 'result-crimes' in contradistinction to 'conduct-crimes' which are offences that punish conduct *per se* and do not require any consequence to result from the prohibited conduct. In result-crimes problems may arise as to the nature of the causative link between the conduct and the consequence. If A gives B a glass of beer laced with poison and B drinks only a small harmless quantity but is later found dead after suffering a massive heart attack, it may be doubted whether A caused B's death. Or, take the case of an assailant who leaves his victim unconscious in a place which is subsequently devastated by earthquake or a tsunami. The conventional view is that while the defendant's act need not be the sole or even a major cause, it must make more than negligible contribution to the occurrence of the relevant result. The defendant is criminally liable only if his conduct substantially contributes to the occurrence of the specified result and no other subsequent unforeseeable cause supersedes the conduct. Problems of causation tend to arise acutely in homicide cases and are discussed in chapter 15 of *Criminal Law in Cameroon - Specific Offences*.

§2. Causation

Problems of causation are very wide, concerned as they are with both factual causation¹⁸ and legal causation¹⁹. Death or other prohibited

¹⁸ Factual causation means that as a matter of fact, X caused the prohibited conduct. A person is said to have factually caused something to happen only if the thing would not have

consequence can be caused by a varied of means. Where the definition of an offence includes the requirement that a particular result be caused, the element of causation is part of the physical elements of the offence. The court then has to decide, following an objective process of examining the circumstances of the case, whether the defendant caused the requisite consequence. Thereafter the court goes on to determine, by a subjective process of examining the mind of the accused and any defence he may raise, whether he is responsible for it. Let it be supposed that A administers a fatal dose of poison to B. While B was still alive a complete stranger, C, comes upon B and shoots him dead. In law it is no excuse for a murderer that his victim was already moribund. Accordingly, C will be held guilty of murder and A of attempt. But let it be supposed that in another case X is engaged in kicking Y to death and a stranger Z rushes in and adds more kicks so that Y's death is expedited. Assuming that it is impracticable to separate and assess the lethal effect of the respective kicks administered to the victim, both X and Z will be guilty of murder.²⁰

There are instances in which the person acting may cause a consequence and yet would not be held legally responsible for it. This would be so in a case where the defendant can avail himself of an absolute defence such as accident, threats, insanity, lawful defence, state of necessity, or obedience to lawful authority.²¹ Moreover, the law provides that an act or omission by a person in execution of the law or authorised by law, and performed in accordance with the conditions prescribed by law does not constitute an offence.²² For example, the act of the public hangman in executing a condemned criminal is not murder because it is an act ordained by law; the act of a police officer making a lawful arrest or a lawful physical search of the person is not assault because it is authorised by law.

Causation problems arise for the most part in the context of homicide; but they are not limited to those cases. They exist whenever the law requires a particular result as a condition for criminal responsibility. They thus also arise

occurred at the time and in the manner in which it happened, if he had not done what he did. The test of factual causation is that X's conduct must have been a *sine qua non*, the 'but-for' cause of the prohibited consequence.

¹⁹ This means that X is legally blameable for the prohibited conduct that caused the prohibited consequence. The conduct is legally ascribable, imputable to X. The concept of legal causation is usually conveyed by expressions such as 'operative cause', 'substantial cause', and 'proximate cause' which the prosecution must establish. A *novus actus interveniens*, proof of which lies on the defendant raising it, is an intervening act or event that is regarded in law as the cause of the prohibited consequence to the exclusion of the proscribed conduct by the defendant.

²⁰ Cecil Turner, *op. cit.*, p. 29.

²¹ Sections 77, 78(1), 79, 80(1), 81, 83, 84 and 86 of the Penal Code.

²² Section 76, Penal Code.

in offences of theft, misappropriation and false pretences (section 318) as well as in offences of bodily injury.

Sometimes they can arise as well in certain ‘economic’ and property-damage offences. Section 256, for example, punishes anyone who “by any fraudulent means causes an artificial increase or decrease of the price of goods or public or private securities.” In arson (section 227(1)), it must be shown that the defendant set the fire, directly or indirectly to the property. Supposing the defendant threw a lighted match-stick to a house and it flickered and died without burning anything and just then the house is struck by lightning and it goes up in flames, he would not be guilty of arson though a conviction for attempt would lie.

Section 4. Concurrence of physical and mental elements

§1. The general rule – coupling of intention and conduct

As a general rule, a person is criminally responsible only if he intentionally commits each of the ingredient acts or omission of an offence with the intention of causing the result which completes it.²³ The defendant must have the criminal intention and have it in relation to both the culpable act and the forbidden consequence. Further, he must have the intention and have it both at the time of the occurrence of the conduct and at the time when the consequence results. The intention must direct and actuate the conduct which achieves the desired result. Since it is the intention that directs and actuates the conduct, the criminal intention and the criminal act must co-exist before the law can intervene. It is the coupling of the intention with an external expression of it (manifested by some conduct) that warrants the law’s intervention. The intention is the legally necessary concomitant to the conduct. It is thus a cardinal rule that the defendant’s criminal intention must exist at the same time as the prohibited conduct by him.

If the defendant acquired the relevant mental element only after his culpable conduct has ceased, he cannot be convicted. Similarly, the defendant is not guilty if he abandons his earlier culpable intention such that his subsequent conduct in causing death cannot be said to have been driven by that intention. A intends to kill B but gives up following his road-to-Damascus-like conversion, then accidentally kills B some weeks later in a road accident. The physical element of killing is present but the mental element of intentional killing is absent. His earlier intention to kill B did not actuate the

²³ Section 74(2), Penal Code.

conduct (driving the car on the occasion in question) by which he has subsequently killed B.

§2. Qualification on the general rule

However, the general rule that both the physical and the mental elements of an offence must be simultaneous or contemporaneous in point of time is subject to some qualification.

Strict contemporaneity is not necessary. It is not necessary that there should be strict contemporaneity of the relevant mental element and the occurrence of the required consequence of the culpable conduct. The consequence of the defendant's conduct may occur sometime after the conduct. In other words there may be quite a time span between culpable conduct and its consequence. If the criminal intention subsists from the time of the conduct right up to the time of the consequence of that conduct then the requirement of contemporaneity is satisfied; if not, it is not satisfied.

Supposing X intentionally shoots Y to kill him but Y does not die and is rushed by neighbours to hospital for treatment. X later becomes remorseful and regrets his act. B dies a week later from the gunshot wound received. Clearly, X's intention to kill Y changed before death occurred. In other words X's act of shooting Y was spent and completed at the time the bullet hit Y and X's intention that Y dies was exhausted when X became remorseful. At the time of Y's death there was no continuing act and no existing criminal intention that could have been superimposed on the act had it been of a continuing character. That does not mean that X is entitled to an acquittal on the reasoning that since death, the consequence of his culpable act in shooting Y, occurred after he had repented, the requirement of simultaneity is absent. It only means X will not be convicted of murder; but he may be convicted of attempted murder or more likely of assault occasioning death (section 278(1)).

In cases of conduct of a continuing character it is not necessary that the mental element should exist at the time of inception of the conduct. Where conduct is clearly of a continuing character it is irrelevant that the defendant lacked the relevant mental element at the precise time of the inception of the culpable conduct, provided that at that material time he had the requisite mental element. X is beating Y to teach him a lesson he will never forget but in the course of doing so decides that Y must die and so beats him to death. The beating is conduct of a continuing character and the intention to kill was not present at the outset of the beating. Nevertheless, the requirement of simultaneity would have been satisfied and X will be convicted of murder.

An act is usually momentary, not continuing, in nature. That being the case, in offences based on some act on the part of the defendant, the requirement of contemporaneity may give rise to a problem. In such offences the time span in which any concomitant state of mind must exist is limited. As soon as the act is achieved, it is exhausted and the intention, its legally necessary concomitant, no longer exists. Any further steps taken by the defendant are taken for some other purpose, with some other intention to achieve another end, such as, for example, evading detection and arrest. Any question of criminal responsibility arising after the proscribed act has been achieved falls to be investigated on the footing of the new intention and the new deed achieved under the actuation of that new intention.²⁴

Series of planned acts which cannot be divided up and which culminate in death. The requirement of simultaneity would also be deemed satisfied in a case of a series of planned acts which cannot be divided up and which culminate in death. The authority frequently cited for this proposition is the Privy Council case of *Thabo Meli & Others v. R*²⁵, an appeal from conviction and sentence for murder, in the High Court of Basutoland (presently Botswana). In that case it appeared that the appellants, acting under a preconceived plot, had brought the deceased to a hut where, after plying him with beer, they struck him on the head with intent to kill him. Then, thinking that he was dead, and in the hope of escaping detection, they rolled the body over a low cliff and arranged the scene so as to make it appear that the deceased had lost his life by accident. There was medical evidence that the deceased was not killed by the blow received in the hut or by the fall over the cliff, but that he had died from exposure to the severe cold at night where he had been left at the bottom of the cliff.

It was contended for the appellants that on this evidence the appellants could not properly be found guilty of murder because, while the first act (the attack in the hut) was accompanied by *mens rea*, it was not the cause of death; and because the second act (the taking of the body outside the hut and rolling it down the cliff where it was exposed to cold), while it was the cause of death, was not accompanied by *mens rea*, the accused believing their victim to be dead already; and so their original intention to kill had already ceased before they did the act which caused the man's death.

The Privy Council rejected this argument, holding that the two acts (injuries to the deceased in the hut, and rolling the deceased over the cliff and

²⁴ Cecil Turner JW, *Russell on Crime*, op. cit. p. 54.

²⁵ [1954] 1 All E R 373.

thus exposing it to cold)) formed part of a series which could not be divided up.²⁶ Accordingly, the accused were found guilty of murder, and not of attempted murder or culpable homicide, as would have been the case if the rejected argument had prevailed. The decision in this case met with much criticism by academic writers. Cecil Turner²⁷, for example, argued as follows:

“It is, however, submitted that so long as the facts do show that the fatal conduct was not actuated by malice aforethought (a question of evidence) it can make no difference that the interval of time is long or short. So that if the evidence establishes that H after striking to kill and immediately believing that he had succeeded in killing had forthwith proceeded to dispose of what he thought was a dead body in such a manner as he hoped would make it appear that the man had met his death by accident, then it would still not be murder if that manner of disposition did bring about the victim’s death: for the steps by which H in fact caused the death were actuated solely by an intention to escape detection, and were taken with no idea whatever that the life of X or of anyone else would be imperilled thereby.”

²⁶ Their Lordships (per Lord Reid) said: “It appears impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as part of their plan; and it is much too refined a ground of argument to say that, because they were under a misapprehension at one stage and thought their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law. Their Lordships do not think that this is a matter which is susceptible of elaboration.” But in his twelfth edition of *Russell on Crime, Volume 1*, at page 57, J.W. Cecil Turner contends that their Lordships got it all wrong and that their decision does not provide any clear *ratio decidendi*: “On analysis of this judgment it would seem (a) that the words ‘impossible to divide’ must surely mean ‘legally impossible’ (since from the point of view of fact and of logic it is by no means impossible, but quite easy); and ‘legally impossible’ must mean simply that there is some recognised legal principle which treats the division as irrelevant (What is that principle? Their Lordships did not indicate it); and (b) that, with all respect, it is difficult to see what is meant by a ground of judgment being ‘much too refined.’ It must be supposed that an exalted tribunal such as, beyond doubt, is the Judicial Committee, would be precisely the body which would take cognisance of refined points of law: and (c) that, again with respect, the use of the words ‘escape the penalties of law’ in this particular context, is circular, a *petitio principii*, since it was precisely for the court to decide, as a matter of law, whether a particular penalty, the penalty of death, had been justly imposed.” Against this criticism it may be said that *Thabo Meli* appears to have been decided in part on the basis that there was no evidence that the accused persons believed, at the time of rolling the victim over the cliff, that he was dead; and in part that the attempt to fake an accident was all part of the preconceived plan and not an extemporisation after the supposed death.

²⁷ *Russell on Crime*, op. cit., pp. 55-56.

In *R v. Chiswibo*²⁸, therefore, the High Court of Rhodesia distinguished *Thabo Meli* by explaining that the case applied only to situations where the disposal of the body formed part of the single transaction to kill the victim and had been planned beforehand. In the view of the Court, so long as the transaction is continuing and the execution of the plan is not yet complete any intention necessary to constitute any crime committed as part of the whole plan may be deemed to be a continuing intention.

However, *Thabo Meli* was applied by the English Court of Appeal in *Church*²⁹, a manslaughter case, even though the act which caused death in that case was not part of a plan as was the case in *Thabo Meli*. The act of the accused was quite unforeseen at the time it was done with *mens rea*. The accused had a fight with a woman and rendered her unconscious. Then believing that she was dead threw her body into a river, where she drowned. The Court of Appeal upheld his conviction for manslaughter on the basis that his conduct constituted a series of acts which culminated in the woman's death.

In a later case, *Le Brun*³⁰ the Court of Appeal approved *Church*. A man and his wife had an argument as they were walking home one night. He knocked her unconscious then tried to drag her out of sight. But she slipped from his grasp and hit her head on the pavement. As a result, she suffered a fractured skull from which she died. There was no antecedent plan as was the case in *Thabo Meli*. The Court applied *Church*, holding that where the non-fatal act done with *mens rea* and the eventual act causing death are parts of the same sequence of events, the fact that there is an appreciable interval between the two does not serve to exonerate the accused. It stated that this was certainly so where a defendant's subsequent actions which caused death, after initial unlawful blow, were designed to conceal the commission of the original assault.³¹

Impossibility of establishing which of several acts actually caused victim's death. Sometimes death may be caused by one of two or more acts by the defendant, such that it is impossible to prove which one. Othello strangles Desdemona and then, thinking her dead, cuts her throat preparatory to dismembering her body and disposing of it. It is not proved which of these acts caused the victim's death. In such a case the defendant can on principle be convicted at least of assault occasioning death (i.e., what is known in some

²⁸ (1961) (2) S.A. 714.

²⁹ [1965] 2 All E R 72.

³⁰ [1991] 4 All E R 673.

³¹ Card, *op. cit.*, p. 207.

jurisdictions as manslaughter) if the court is satisfied that whichever act caused the death, each of them was accompanied by a sufficient state of mind for assault occasioning death. The same would apply to a charge of murder or capital murder if each act is proved to have been accompanied by a sufficient state of mind for murder or capital murder as the case may be.

Defences of General Application: Absolute Defences

The criminal law knows of two broad types of defences, general and specific. General defences apply to all offences. Any one of those defences that is appropriate to any case may be raised. Specific defences, by contrast, are those available only in respect of certain offences. A specific defence is thus one that is specifically and expressly provided for in relation to an offence as defined in a statute and which may be urged on behalf of a person who has committed that particular offence to get him exempted from punishment. Such a defence is often embedded, expressly or impliedly, in each offence as defined. Indeed, the definition of an offence may include a reference to elements of defence as part of its physical elements. Examples of specific defences are: consent where the charge is rape or stealing; truth where the charge is defamation; a *bona fide* claim of right where the charge is theft; lack of intention where intention is the requisite mental element of the offence charged; lack of an ingredient act or omission where the offence charged is one that requires an act or an omission as the physical element of the offence. Specific defences are dealt with in my *Criminal Law in Cameroon – Specific Offences* in relation to each particular offence.

Evidential burden when a general defence is raised. The fact is worthy of note that because of the presumption of innocence¹, a principle that is implicit in section 74 of the Code, the prosecution bears (i) the legal burden of proving beyond reasonable doubt all the elements of the offence as defined, and (ii) the evidential burden of introducing evidence at the beginning of the trial. The legal definition and specification of prohibited conduct indicate the essential facts which must be present to constitute the forbidden conduct in question; and which, therefore, the prosecution must establish against the defendant.

¹ The presumption of innocence, the principle against self-incrimination, and the right to remain silent – these are the basic features of the right to a fair trial under the Common Law system of criminal justice. It is thus not for the defendant to establish his innocence since the law already presumes him to be innocent. Rather, it is for the prosecution to establish the defendant's guilt, and to do so beyond a reasonable doubt. This means that if there is a reasonable possibility that the defendant might be innocent, then there is a reasonable doubt as to his guilt. That doubt must be resolved in his favour by acquitting him.

When the defendant raises a defence he is in fact pleading a matter peculiarly within his knowledge. Since the matter is especially within his knowledge the law casts upon him the burden of proving that fact. This does not mean that the burden is upon him to prove that no crime has been committed; for the onus is never upon the defendant to establish any defence apart from the defence of insanity (which he is required to establish because of the operation of the rebuttable presumption of sanity). The defendant has the onus merely to adduce sufficient evidence to satisfy the court and from which it could reasonably infer that the defence avails the defendant. He has the burden of adducing sufficient evidence to raise an issue that he acted under the defence being urged upon the court. When the evidential burden has been discharged by the defendant, it shifts to the prosecution to rebut the defence beyond reasonable doubt.

‘Justification’ and ‘excuse’. There are instances in which a person commits an act prohibited by the criminal law and yet is exonerated from criminal liability. He literally gets away with murder, so to speak. The reason is that the act committed is only apparently an offence because there are existing circumstances in relation to the act which legalise (justify or excuse) the conduct in question. For example, one who repels an attacker or who reacts to a provoker with force may rely on lawful defence or provocation even though he committed the physical element of assault with the necessary mental element. The one who pleads lawful defence is relying on a defence known in the literature as ‘justification’ and the one who pleads provocation is relying on a defence known as ‘excuse’. Professor Glanville Williams points out that this different terminology relates to an ancient era preceding the Middle Ages when justification absolved, while excuses were merely a matter for mitigation of punishment.²

The legal effect of both has long been the same. Where justification is pleaded it is conceded that the definition of the offence is satisfied, but it is asserted that the act is not wrongful but right. The person cannot therefore be held criminally responsible and is accordingly exonerated. On the other hand when excuse is pleaded it is conceded that the act is wrongful, but it is argued that the act should not be attributed to the actor because he is not accountable for the concededly wrongful act. The result of this non-accountability is that the person is exculpated from criminal liability.

² Williams G, *Textbook*, p. 39.

The distinction between 'justification' and 'excuse' forms the analytical mould in which criminal law defences are classified in some jurisdictions, especially in continental Europe. Defences that are grounds for justification are said to be those that negative the wrongfulness of the conduct, i.e., they argue that the conduct in question is not wrongful and that the 'violation' of the prohibited conduct is justified. Law enforcement and self-defence are often referred to as typical examples of grounds for justification. Defences classified as 'excuse', on the other hand, are those that deny only the culpability of the defendant for his wrongful conduct. They concede the wrongfulness of the conduct but argue that the circumstances under which the defendant acted are so special or peculiar that as a matter of fairness the conduct cannot truly be imputed or attributed to the defendant. Paradigmatic grounds for 'excuse' are said to be insanity and compulsion.

Where justification or excuse is successfully pleaded the end result in either case is the same: the defendant gets an acquittal. In either case also the evidential burden of proof is on the defendant to adduce sufficient evidence to satisfy the court that he has a credible defence. Thus, although there might be some interest, from an academic point of view, in making an analytical or a conceptual distinction between the two, it is ultimately a distinction without a difference and without practical interest. Moreover, the notions of justification and excuse as propounded in the preceding paragraphs do overlap and sometimes one defence, for example, threat (duress), may operate in some cases as an excuse and in other cases as a justification.

Perhaps the only practical interest in operating a distinction between justification and excuse lies in the consequence of each in regard to co-offenders and secondary parties. A defence that justifies an otherwise unlawful act committed by the defendant entails his acquittal. But that is not all. His act or conduct has no taint of criminality and receives judicial imprimatur as lawful. Being a lawful act other parties involved in the doing of it also go free. In the case of a defence that is exculpatory, by contrast, the defendant is merely exculpated or excused from criminal responsibility. The act or conduct itself does not change in character. It remains criminal, so that while the defendant goes free other parties to it, such as co-offenders and accomplices remain criminally responsible and are punishable.

The somewhat arcane distinction between 'justification' and 'excuse' is not made or even mentioned in the Penal Code. On the matter of criminal responsibility the way the Code is organised is that it first declares three core principles before providing for general defences. The Code declares that criminal responsibility shall lie on him who intentionally commits each of the ingredient acts or omissions of an offence with the intention of causing the

result which completes it (section 74). It further declares that ignorance of the law and motive shall not be material to criminal responsibility (section 75). It furthermore declares that no act or omission in execution of the law or authorised by law shall constitute an offence (section 76).

Execution of the law. Section 76 does not purport to spell out a defence as such. It declares a general principle. It declares that “no act or omission in execution of the law or authorised by law, and performed in accordance with the conditions prescribed by law, shall constitute an offence.” What is here declared is self-evident because the law cannot criminalise what it authorises. Law enforcement cannot be criminalised. It is tempting to read into section 76 what some might call a ground for justification. But the section is not a defence as such but simply a statement of the obvious that the law cannot in one and the same breath authorise and criminalise an act. An act done under the authority of the law negates the existence of *mens rea* or the intention fault element. The section seems to have been dictated by considerations of drafting style as the explanatory note that immediately follows the section makes clear.

“But for this section it would be necessary to provide in the definition of each individual offence for the absence of execution of the law and of authority by law as an ingredient. Section 76 makes these repetitions unnecessary, but the absence of authority remains an (sic) universal negative ingredient in respect of which, as of all other ingredients, section 74(2) demands the intention of the accused in order that he may be criminally responsible.”

It is patent that acts or omissions consistent with the law cannot be an offence. Such conduct (e.g., lawful arrest, lawful entry, lawful use of force, lawful service of process, and lawful execution by the public ‘hangman’ of a person sentenced to death) is not a violation of the law; it is in fact acting as the law has commanded or authorised and therefore the doer of the deed is entitled to commendation not reprehension. Conduct in execution of the law escapes prosecution and so there is no trial; and therefore no question of conviction or acquittal arises.

Of course, the doer of a deed in execution of the law must in doing so conform to the conditions prescribed by law because what the law commands or authorises to be done consists of two elements, the express order or direction to do something plus the prescribed conditions for doing the thing. The conjoining of both elements is what constitutes ‘execution of the law’. If in ‘execution of the law’ D mistakenly does the wrong thing and is then

charged with an offence he may thereby have committed, the defence open to him is mistake of fact and not 'execution of the law' as there was in fact no execution of the law.

After declaring core principles in sections 74, 75 and 76 the Code then provides for general defences in one mixed bag, apparently in no logical order and under one broad caption, 'irresponsibility and diminished responsibility.' The defences can however be dissociated into absolute defences, these being grounded on the notion of irresponsibility, and partial defences, grounded on the concept of diminish responsibility.

Defences that are grounded on the notion of irresponsibility are those which when successfully pleaded, responsibility is completely removed or eliminated. The doer of the deed is completely absolved from criminal liability for the legally prohibited act he has committed and is therefore set free. General defences that fall under this category are always couched in language that begins with the phrase, "no criminal responsibility shall arise ..." Criminal responsibility carries with it liability to suffer punishment. When therefore it is said that a person is criminally irresponsible that means that in law the person has committed no offence (meaning that the requirement of section 74(2) has not been satisfied) and consequently he is not liable to punishment. When successfully pleaded by the defendant such a defence negates criminal liability. In the eyes of the law no offence has been committed and so no penalty is incurred. The defendant is acquitted. Defences that have this result are denoted in the literature as 'absolute defences'.

The absolute-defences category. The absolute-defences category comprises all those defences in which the law declares that the conduct by the defendant gives rise to no criminal responsibility. The effect of irresponsibility is that the act in question cannot be ascribed or imputed *de jure* (as opposed to *de facto*) to the defendant who then is entitled to an acquittal. Thus the legal effect of an absolute defence is that it negatives and removes criminal responsibility independently of judicial discretion. Absolute defences of general application are the defences provided under sections 77, 78(1), 79, 80(1), 81, 83, 84 and 86.

Some absolute defences of general application (e.g., insanity, intoxication, and infancy) are grounded on conditions internal or endogenous to the defendant in that they relate to the state of mind of the defendant. They inform the plea of criminal incapacity. Some other absolute defences (accident, irresistible physical compulsion, obedience to lawful authority, lawful defence, and state of necessity) are grounded on exogenous factors, factors external to the defendant in that they are attributable to external stimuli.

Section 1. Insanity

When a person does something brutally anti-social we sometimes express our disapproval of it by saying “he must be mad.” The doer of the act may or may not be mad in the psychiatric conception of insanity. But the lawyer’s comprehension of insanity is that it is “mental illness” of such a degree that it deprives the afflicted person either (i) of all will-power, or (ii) of the knowledge that what he does is blameworthy. Firstly, a person is legally insane if he suffers from mental illness which deprives him of all will-power. When mental illness deprives a person of all will-power it impairs his conative functions so that he lacks capacity to choose between right and wrong and ability to control himself. Secondly, a person is also legally insane if he suffers from mental illness which deprives him of knowledge that what he does is blameworthy. When mental illness deprives a person of knowledge of blameworthiness of what he does, it impairs his cognitive functions.

Many people tend to see insanity or madness as something of a mysterious affliction. Attitudes towards mad people are therefore confused. In this country the ordinary person’s understanding of insanity is limited to the few occasional mad persons seen roaming the streets naked or in dirty clothing and rummaging in rubbish bins for food, or to mad people held in chains in some facility managed by traditional healers vaunting a power or an ability to cure madness. The popular notion of an insane person is therefore that of a person who is dirty, in poor clothing, incoherent in speech if and when he talks, apparently violent and roaming the streets aimlessly, and unable to take care of himself. Also, popular understanding of insanity is limited to traditional beliefs and tales of madness as condign punishment from the world beyond for some transgression or bad conduct by the person struck by that particular malady. People in ancient societies had a similar attitude towards madness.³

The development of psychiatry in the nineteenth century increased knowledge about insanity. This led to the classification of insane people into the following five groups: those suffering from severe mental retardation (idiots); those suffering from depression (melancholic persons); those suffering from a state of excitement and mental confusion or delirium centred on a particular object (monomaniacs); those suffering from definitive mental illness; and those suffering from mental disorder characterised by great or

³ For example, in European Antiquity madness was said to be caused by the new moon and, during the Middle Ages, it was said to be caused by the devil. The lunatic was considered a person possessed by the evil spirit and the only available form of ‘treatment’ was exorcism. If exorcism failed to dislodge the evil spirit from the lunatic’s body he was put in a house for the insane (a lunatic asylum) and there held until death mercifully put an end to his wretched existence.

violent excitement (maniacs). By the middle of the twentieth century medical science understood as a disease of the brain (encephalon) consisting of three types, namely, insanity affecting the mind or thought, insanity affecting behaviour, and insanity affecting sentiments.

Later, a classification based on the aetiology (causes of diseases) of mental alienation was thought more appropriate. This yielded the following re-classification of insanity: hereditary insanity; neuroses such as epilepsy or hysteria or depression; sympathetic insanity connected with certain organic illnesses; insanity brought about by toxic agencies such as alcohol and morphine; insanity strictly speaking i.e., the definitive and irremediable failure of the cerebral faculties; and idiopathic insanity (of unknown cause) affecting the nervous centres such as general paralysis and, melancholia.

Today, psycho-pathology classifies insanity aetiologically and descriptively. The aetiological classification distinguishes between psychosis/neurosis on the one hand, and, organic/functional psychosis, on the other hand. According to the descriptive classification some of the principal manifestations of insanity are: altered or lost mental faculties which were once fully developed, chronic delirium, states of excitement, states of depression, illnesses of character and humour (e.g., paranoia, obsession, instinctive perversion), and intellectual illness (i.e., intellectual inadequacy often leading to impulsiveness, suggestibility and misery due to social inadaptability). But complete unanimity on this very depressing human condition continues to elude the scientific world. Even today, psychiatry and psychology do not always speak with one voice about this miserable condition that can overwhelm a human being. Partly for this reason the lawyer is not sure how to treat the evidence on the subject given by medical experts.

However, there appears to be three principal categories of mental functions or faculties in human beings, namely, cognitive, conative and affective functions.

“The **cognitive functions** are our intellectual functions, that is, our ability to assimilate information from the environment, remember it, organise and process it in a rational manner, drawing rational conclusions, and making appropriate decisions. Thus, they include our functions of perception, thinking, reasoning, understanding, judgement and recall. A person’s ability to distinguish between right and wrong; to know when certain conduct would be wrong according to the standards of law, society and/or morality; and to decide on an appropriate course of action, depends on that person’s cognitive functions. Where the cognitive functions are impaired through mental illness or defect, intoxication, or are

not yet fully developed, as in the case of children, the individual would be unable to do these things effectively, if at all. The **conative functions** are our volitional functions, that is, our ability to control and direct our behaviour towards achieving a particular goal or object by exercising our power of will, rather than merely acting on impulse, like an animal. A person's ability to govern his behaviour to avoid doing what he knows or believes to be wrong depends on the exercise of his conative functions. Where the conative functions are impaired through mental illness or defect, intoxication, or are not yet fully developed, as in the case of children (who are notoriously impulsive), the person would be unable to do this effectively, if at all. The **affective functions** are our emotions, both pleasant and unpleasant, and simple and complex, such as love, hate, rage, fear, joy, anxiety, disappointment, jealousy, empathy and remorse. Emotions can be a powerful motivating force, causing us to want to act in a particular way. Intense emotions can even produce involuntary physiological changes such as sweating, blushing or blanching, trembling, and fist-clenching, over which we have no control. The way in which we feel in certain situations can also cause us to unconsciously adopt certain characteristic poses and gestures – so-called 'body language' – which, because it is an instinctive reaction, may be difficult to control or avoid. Despite these facts, a normal adult is capable of controlling the expression of his emotions in order to avoid committing antisocial acts.”⁴

§1. Formulation of the insanity defence

In England the insanity defence is contained in the M'Naghten Rules propounded by the judges in their advice to the House of Lords in *M'Naghten's Case*⁵. In that case, one Daniel M'Naghten shot and killed the private secretary to the British Prime Minister, Sir Robert Peel, thinking that it was Peel himself. M'Naghten suffered from paranoia (paranoid schizophrenia or persecution mania). He was actuated by the morbid delusion that he was being persecuted by Catholic spies with the support of members of the Tory political party, which was then in power. He decided that the only way to protect himself was to assassinate the British Prime Minister. He mistakenly shot and killed the Prime Minister's secretary, Mr Edward Drummond. According to the nine experts who gave evidence at his trial, M'Naghten was insane and unable to distinguish right from wrong. The jury returned a verdict of not guilty by reason of insanity. M'Naghten was acquitted on the ground of insanity but committed to a mental hospital, where he spent the rest of his life. This

⁴ Kemp et al., pp. 132-133.

⁵ (1843) 8 ER 718.

supposed leniency caused a public outcry prompting the House of Lords to debate the law on insanity. At the end of the debate the members of the House decided to request the Law Lords of the House to advise them on the relevant legal principles regarding insanity. The joint answer given by fourteen Law Lords came to be known as the M’Naghten Rules.

Technically, the answers given by those judges, divorced from a consideration of any particular case, are not binding as a precedent. However, even though the answers or rules were not laid down in a case decided by the House of Lords, they have been repeatedly recognised and been so frequently followed and approved that they are taken as authoritative and representing the law on insanity in England. The Rules state in substance as follows: (i) that everyone is presumed sane until the contrary is proved; and (ii) that it is a defence to a criminal prosecution for the accused to show that at the time he committed the act he was “labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong.”

In this country the insanity defence is available under section 78(1) of the Penal Code. The defence is couched in these terms:

“No criminal responsibility shall arise from the act or omission of a person suffering from mental illness which deprives him of all will-power or of the knowledge that what he does is blameworthy.”

This provision deals with total insanity, that is, complete mental illness or impairment.⁶ In terms of this provision, insanity in law means mental illness which deprives a person either of all will-power or of knowledge of the wrongfulness of his conduct.

Under that provision there are two things a defendant who raises the defence of insanity must prove in order to succeed. First, he must prove that he is suffering from mental illness. Secondly, he must prove that the mental illness either deprived him of all will-power, or, in the alternative, that it

⁶ Where insanity is only partial in the sense that the defendant is not completely deprived of all-will power or of knowledge of the blameworthiness of his conduct the appropriate defence is diminished responsibility under section 78(2). Total mental illness affects criminal responsibility in that it is exculpatory and therefore results in an acquittal. Partial mental illness does not affect criminal responsibility. The person still has criminal capacity, although in a reduced or diminished form. Diminished responsibility is only mitigatory, resulting in a more lenient sentence.

deprived him of the knowledge that what he did is blameworthy. The deprivation of all will-power, or of knowledge of blameworthiness of the conduct, must be as a result of mental illness. In other words, the causal connection between mental illness and deprivation of all will-power, or mental illness and deprivation of knowledge of blameworthy conduct, must be established. The defence will fail if the deprivation of all will-power or of knowledge of blameworthiness of the conduct was caused by an illness other than a mental one as, for example, cerebral or some other physical illness. If D committed an offence while under a hypnotic trance, whether induced by a hypnotist or by a witch-doctor or by the gods, a plea of insanity will fail.

Mental illness. The defendant must show that at the time he committed the act he was suffering from mental illness. Mental illness is a pathological condition (disease-related), a disease of the mind, not a physical illness. So long as the cause of the mental illness is internal or endogenous to the accused, it is of no consequence that the illness is of short or long duration, treatable or untreatable, recurrent or not, organic or psychogenic.⁷ Physical illnesses are usually due to identifiable physical causes, whereas the aetiology (cause) of mental illness is often much more uncertain.

Mental illness covers many different types of mental abnormalities, for example, psychoses such as schizophrenia. However, the legal meaning of mental illness is that it is a disease of the mind and, controversially, not a disease of the brain. In the English case of *R. v. Kemp*⁸ the accused was charged with causing grievous bodily harm to his wife. He suffered from arteriosclerosis (hardening of the arteries). The disease had not yet reached a stage at which he displayed any general sign of mental trouble but it could lead to a congestion of blood in the brain, causing a temporary lapse of consciousness. It was when he was in this state that he attacked his wife. He was an elderly man of excellent character and he and his wife were said to be a devoted couple. His defence was that he was unconscious at the time. It was accepted by the prosecution that he did not know what he was doing. Medical evidence adduced stated that the accused struck his wife not knowing anything about it, and not having any real memory of it. The judge himself said the accused was not conscious that he picked up the hammer or that he was striking his wife with it. There was medical evidence that the loss of consciousness, caused by congestion of blood in the brain, resulted in the patient's acting irrationally and irresponsibly but that there was not such a degeneration of the brain cells of the accused as to amount to disease of the

⁷ Kemp et al., pp.144-145.

⁸ [1957] 1 Q.B. 399.

mind. There was also medical evidence that arteriosclerosis included a condition of melancholia as a result of which the accused committed the act; and that melancholia was a disease of the mind.

Notwithstanding this medical evidence on the condition of the brain affected by blood clot, Devlin J, ruled that:

“The law is not concerned with the brain but with the mind in the sense that ‘mind’ is ordinarily used, the mental faculties of reason, memory and understanding. ... In my judgment the condition of the brain is irrelevant and so is the question of whether the condition of the mind is curable or incurable, transitory or permanent.”⁹

In *Sullivan*¹⁰, S was charged with inflicting grievous bodily harm on P. At the trial he admitted the act but asserted by way of defence that he had done so while in an epileptic seizure. The trial judge ruled that this amounted to a defence of insanity rather than a defence of automatism. S then changed his plea to that of guilty of assault occasioning actual bodily harm. He was convicted on that offence. His appeal to the Court of Appeal was dismissed and his further appeal to the House of Lords fared no better. Lord Diplock seized the opportunity offered by this case to amplify the statement that was made a quarter of a century earlier by Devlin J in *Kemp*. He said:

“Mind in the M’Naghten Rules is used in the ordinary sense of the mental faculties of reason, memory and understanding. If the effect of a disease is to impair these faculties ... it matters not whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent or is transient and intermittent, provided it subsisted at the time of the commission of the act.”

Indeed, as Devlin J. observed in *Kemp*, it also matters not whether the impairment is curable or incurable. Epilepsy is thought to be caused by

⁹ This statement did not go without criticism in certain circles. “In this statement,” argues Cecil Turner, p. 113, fn 49, “the adjective ‘mental’ must refer either (a) to the mind or (b) to the brain. Now if, (a), it refers to the mind then the statement is meaningless for it amounts to the proposition ‘mind = the faculty of the mind’. It must therefore refer, (b), to the brain, and thus the statement must mean ‘the sense in which mind is ordinarily used is the brain’s faculties of reason, etc. But these words ‘Reason, memory and understanding’ are abstractions denoting functions of the brain which is the visible tangible content of the cranium. ... [T]he human brain operate[s] to produce reason, memory and understanding, none of which can exist if ... the brain is destroyed and any of which may be impaired if the brain is crippled by disease.”

¹⁰ [1983] 2 All ER 673.

chemical imbalance in the brain that causes some of the nerve cells in the brain to become overactive and fire off random, uncontrollable signals. This results in repeated seizures.

“There are different types of epileptic seizure. Seizures may be partial (affect only a particular part of the brain) or generalised (affect the whole brain). A person who suffers a simple partial seizure will remain conscious, and will merely experience a strange sensation (commonly known as an aura). A person who suffers a complex partial seizure will experience a brief loss of consciousness, during which they may blink, twitch, chew or smack their lips. They may also throw things around and struggle if restrained. They may seem to be conscious, but will not in fact be aware of their surroundings. In the case of generalised seizures, a person may also suffer no more than a momentary loss of consciousness (also known as an absence seizure or a *petit mal* seizure). Alternatively, they may lose consciousness for a few minutes, fall to the floor and make involuntary jerking movements with their body and limbs (known as a *grand mal* seizure). In some cases a *grand mal* seizure may be preceded by a simple partial seizure, which then spreads to the rest of the brain. In such cases, the aura (strange sensation, taste or smell) accompanying the partial seizure can serve as a warning of the impending *grand mal* seizure. In other cases however, there is no such warning.”¹¹

On principle, since movements performed during an epileptic seizure are involuntary, they ought not to result in criminal responsibility. But the cause of epilepsy is centred in the brain and since mental illness is understood legally as a disease of the mind, the courts are consistent in their rejection of epilepsy as a mental illness.

Mental illness is sometimes also referred to as mental disease or disease of the mind. There must therefore be an illness characterised as a disease of the mind. Cerebral tumour, natural imbecility (idiocy) and brutish stupidity, for example, are diseases of the brain and thus do not qualify as diseases of the mind. Mental faculties may be impaired in at least three ways: (i) when the brain is affected by pathological degeneration and its development stops before it reaches full maturity such as the case of idiocy, imbecility and weakness of mind accompanied by perverse instincts; (ii) when an adult is under the influence of transitory psychic disorders originating from the temporary malfunctioning of the cerebrum (the main part of the human brain

¹¹ Kemp et al., p. 34.

associated with thought, emotion and personality) such as states of dreaming, drunkenness and hypnotism; and (iii) when organic-pathological causes hinder the free play of intellectual faculties which were hitherto fully developed as in the case of madness in all its manifestations. The insanity defence under section 78(1) embraces only the third situation because it involves a disease of the mind.

A disease of the mind is one brought about by internal, not external, causes. In the Canadian case of *Rabey v. R*¹² it was held that the mental impairment of a person, who acted under a dissociative state consequent on the psychological blow of his rejection by a girl with whom he was infatuated, was due to an internal cause; the psychological blow was not to be equated with an external cause such as concussion. “The ordinary stresses and disappointments of life which are the common lot of mankind,” Martin J. said when he tried the case in the court below, “do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a disease of the mind.” This ordinary event of being jilted by a woman had an exceptional effect on the accused and had to be considered as having its source primarily in the psychological make-up of the accused.

By contrast the defence of insanity was rejected in the Nigerian case of *R. v. Alice Eriyamremu*¹³ where a woman who killed her albino grand-daughter pleaded that she had acted under the witchcraft influence of her associates in witchcraft practices. The court held that even if she was afflicted by mental infirmity at the time she killed the girl the infirmity was not natural (i.e. brought about by an internal cause) but was brought about by her juju or witchcraft practices (external cause). Similarly it was held in the English case of *T*¹⁴ that a state of dissociation, such as post-traumatic stress, resulting from being raped was due to an external cause, and was therefore not due to a disease of the mind. Unlike in *Rabey*, this was not a case of the ordinary stresses of life. The state of dissociation could not be said to have its source in the psychological make-up of the accused. Rape, an external factor, was the immediate cause of the dissociative state.

Professor Card makes the observation that the distinction between internal and external causes is now established but not always easy to draw.

“The distinction between mental impairment due to disease and mental impairment not due to disease is now established as between

¹² (1977) 37 CCC (2nd) 461.

¹³ [1959] W.R.N.L.R. 270.

¹⁴ [1990] Crim LR 256.

internal and external causes. For the mental impairment to be due to disease, the immediate cause of the impairment must be internal to the accused. A malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease and does not constitute a disease of the mind. The same is true when a woman suffers a state of dissociation resulting (as post-traumatic stress disorder) from being raped or where a diabetic gets into a hypoglycaemic coma as a result of failing to take food after taking insulin (since the consequent effect of the insulin is due to an external factor). It would be different if a diabetic failed to take his insulin and got into a hyperglycaemic coma as a result, because it would be the diabetes itself (an internal factor) which would have caused the coma. The distinction which the law draws between hypoglycaemia (not a disease of the mind) and hyperglycaemia (disease of the mind) is not easy to defend. Why should a distinction be drawn between a diabetic who gets into a hypoglycaemic coma as a result of taking too much insulin or failing to eat adequately after taking the correct dose and a diabetic who gets into a hyperglycaemic coma as a result of not taking his insulin? ... The distinction between mental impairment due to disease (i.e. due to an internal cause) and mental impairment not due to disease (i.e. due to an external cause) is not always easy to draw.”¹⁵

Concussion may cause mental impairment. But it would in law not amount to mental illness or disease of the mind because concussion is an external not an internal factor. It seems to be the case also that sleepwalking, a sleep disorder known in medical jargon as somnambulism, is not a mental illness. However, sleepwalking may be pleaded as an absolute defence if the accused was suffering from mental disorder at the time he did the act during the sleepwalking episode. In *Burgess*¹⁶ the accused wounded a woman when he was sleepwalking. Medical evidence was adduced showing that at the material time the accused was suffering from an abnormality or disorder, albeit transitory, due to an internal factor, whether functional or organic, which had manifested

¹⁵ At pages 134-135. The learned author further explains in footnote 11 at page 135: “Diabetes is a deficiency in the system of the production of the hormone, insulin, which balances the sugar metabolism. In the absence of that hormone the blood sugar rises and that results in hyperglycaemia and ultimately to hyperglycaemic coma. If a diabetic takes too much insulin to treat his hormonal deficiency, or fails to eat adequately after taking the correct dose in order to counterbalance it, the blood sugar may fall too far and hypoglycaemia and ultimately hypoglycaemic coma may result.”

¹⁶ [1991] 2 All ER 769.

itself in violence and might recur. The Court of Appeal held that in light of the evidence, the trial judge had been correct to rule that on any view of the medical evidence the accused had been suffering from a disease of the mind at the material time.

In the South African case of *R v Dblamini*¹⁷, the accused spent the night in a room with the deceased and others. While asleep he stabbed and killed the deceased who had stooped near the accused to pick up a nearby sleeping mat. The defence was sleepwalking. The accused testified that he had a vague recollection of seeing faces looking at him through a window and had dreamt that he was being attacked and was defending himself. There was no motive for the killing. It was held, acquitting the accused, that it was probable that he had just awoken out of a nightmare and that he was “acting mechanically, without intention, volition or motive.” The Court said, obiter, that a sleepwalker who killed another person in his sleep could be held criminally liable, though to a lesser extent, if he had been negligent, that is, if he had known that he was prone to committing acts of violence in his sleep and had failed to take reasonable precautions for the safety of others before going to sleep.

In *Dblamini* there was no medical finding of abnormality due to internal factors as was in *Burgess*. The case therefore appears to have been decided on the basis of sane automatism rather than on that insane automatism (and therefore mental illness). Where sleepwalking as such succeeds as a defence it, would be because acts done when sleepwalking are involuntary (no *mens rea* or no *actus reus*, legally speaking) and therefore cannot give rise to criminal responsibility. The true basis for exculpation in such a case is automatism. The sleepwalker acts mechanically, like an automaton or robot. He performs what appears to be a conscious act. But more often than not he is not in conscious control of that action, or even aware of what he is doing. He acts in a state of automatism, with no will or thought of his own, like a programmed mechanical device.

Nature plays tricks on human beings every day. When we fall asleep¹⁸ we do not always lie perfectly still all the time. Some people toss and turn in their sleep or turn over and move their limbs, without being conscious of doing so. Some others make facial expressions, talk, cry, sing, laugh in their sleep, or get up do things, again without being conscious of doing so.

¹⁷ 1955 (1) SA 120 (T).

¹⁸ Sleep is a state of rest during which the eyes are closed, the muscles and nerves are relaxed, and the mind is unconscious. By sleeping we therefore experience a little bit of death.

“Some individuals also get up and walk around in their sleep, or perform other activities that are normally only performed when awake. Sleepwalkers’ eyes are open and they are generally able to navigate their surroundings. In some cases, they may even perform fairly complicated tasks, such as getting into a car and switching on the engine. Some commit acts of violence whilst in this state, but a sleepwalker is not conscious of his actions and will not remember them when he wakes up.”¹⁹

The sleepwalker acts like an automaton. But cases of genuine automatism are not common and are usually difficult to prove. But sleepwalking, brain tumour, epilepsy, alcohol or drug abuse, and concussion tend to be classified as cases of sane automatism.

“Automatism may be classified according to whether it is organic (originating with the body, possibly as a result of physical illness or injury, such as epilepsy, concussion, or brain tumour), toxic (caused by the consumption of alcohol, drugs, or some other intoxicating substance) or psychogenic (originating in the mind, that is, due to psychological factors that may or may not result from a mental illness or defect.”²⁰

Verdict of the court. As a general rule, the question whether a defendant is criminally responsible or not is determined by considering the act at the time it was done. An insane person may have lucid intervals. If he does an unlawful act during a lucid interval he would be fully responsible for it in law. It may happen that the insanity resumes afterwards and subsists up to the time of trial. In such a case, the insane person is liable to conviction of the offence and if his liberty would constitute a danger to the public, the court may order his confinement in a special health institution (s.44, Penal Code). By contrast, where an insane person did an act while he was insane but later has a lucid interval or appears to have recovered, he will be acquitted since he was insane at the time of the unlawful deed. However, the court is at liberty to order his confinement in a special health institution if it is satisfied that his liberty would be a public danger (s.43, Penal Code).

If a person is possessed of his faculties at the time he commits an unlawful act but becomes insane at the time of the trial he will be unfit to plead or to conduct his defence. The trial court may acquit him on the ground of unfitness to stand trial, that is to say, the person is unable to understand and follow the trial and to give instructions to his counsel. However, the court will

¹⁹ Kemp et al., p. 33.

²⁰ Kemp et al., p. 32.

make a hospital order if satisfied that the person's liberty would be a danger to the public (s. 43, Penal Code). Alternatively, the court may make a hospital order for treatment, after which the person would be brought back to court to stand trial for his unlawful conduct. The law in this country is silent on this last point but not the law in some jurisdictions.

Deprivation of all will-power. Deprivation of all will power means the person has lost all capacity to control his actions. Since the actions of the normal person are willed or purposive actions (i.e., actuated by will) the crippling of the will-power in effect means the person's conduct is not conscious and voluntary. His acts are not consciously willed bodily movements. They are acts that are irresistible or uncontrollable due to mental illness. For, the deprivation of all will-power must be due to mental illness and not to the innate weakness of will power or a physical illness, such as cases of hysterical amnesia²¹, mere blackout²², and concussion²³. These are not cases of insanity. But they could be pressed into service to support the omnibus defence of lack of *mens rea*.

While insanity must be total or complete to constitute a defence under section 78(1), it need not be generalised madness. Particular madness, such as kleptomania (theft madness) and pyromania (fire madness), is capable of negating criminal responsibility in the same way as generalised madness. But particular madness would have this effect only where the act was committed specifically under its influence. Kleptomania would not, for example, exonerate a kleptomaniac charged, not with theft, but with, say, homicide or indecent assault.

All will-power must be completely destroyed as a result of mental illness. In other words, the destruction of the will power must be due to mental impairment caused by internal (not external) factors. Being deprived of all will-power is more than just forgetfulness for example, even if resulting from psychotic depression, momentary confusion or a transient absent-mindedness. In *Clarke*²⁴ a woman was charged with theft by shoplifting from a supermarket. Her defence was that she had no intention to steal but had taken the goods in a state of absent-mindedness resulting from a diabetic depression induced by sugar deficiency. The trial judge ruled that the woman's defence was in fact insanity. The woman did not want to be found insane and changed her plea to

²¹ Loss of memory which prevents the sufferer from remembering events.

²² A temporary loss of consciousness.

²³ Suffered, for example, in an accident, rendering the sufferer incapable of remembering what he did.

²⁴ [1972] 1 All ER 219.

one of guilty as charged and was convicted. Allowing her appeal against conviction, the Court of Appeal held that the woman's defence was simply one of lack of *mens rea* and not a defence of insanity. Temporary absent-mindedness due to disease, the Court said, was not a defect of reason (deprivation of all will-power) due to disease.

The will-power is not crippled where a person retains his will-power but fails to use it fully in moments of confusion or absent-mindedness. Impaired consciousness such as confusion, rage response, delusion or dissociative states may be regarded as incompatible with the mental element in crime but it does not amount to insanity on the lips of lawyers. The usual type of sleepwalker is not deprived of all will-power. Nor is the person who acts under a confused state produced by concussion. Nor again is the person who acts while under an epileptic seizure or who is afflicted by hypoglycaemia or who suffers from hysterical neuroses (such as the 'split personality' of the Jekyll and Hyde type). Further still, delusions which do not prevent the accused from having *mens rea* will afford no defence. So, the mere fact that a man thinks he is John the Baptist does not entitle him to shoot his mother.

Similarly, if the accused knew that his act was forbidden by law, it shall not lie in his mouth to say that he was under an insane delusion, obeying a divine command; or that what he did was the work of the devil. Thus, sociopathy and psychopathy are not recognised as forms of mental illness or as causes of pathological criminal incapacity. Kemp et al. offer the following reasons for the law's lack of sympathy for sociopaths and psychopaths and its objection to treating psychopathy and sociopathy as an excuse for crime:

"Sociopaths are characterised by a lack of conscience, selfishness, egocentricity, deceitfulness, callousness, impulsiveness, exaggerated sexuality, excessive boasting, risk taking, inability to resist temptation, inability to love or be loved, aggressiveness and sadism. Psychopaths are characterised by glib and superficial charm, grandiose sense of self-worth, the ability to con and manipulate, a lack of remorse or guilt, shallow emotions, callousness and a lack of empathy, a parasitic lifestyle, poor behavioural controls, promiscuity, fearlessness, early behavioural problems, lack of realistic long-term goals, impulsiveness, irresponsibility, a failure to accept responsibility for their own actions, juvenile delinquency, and criminal versatility ... Both psychopaths and sociopaths are capable of committing horrendous crimes without remorse. Their conduct can be so appalling and they can be so incorrigible that it is impossible to avoid the conclusion that they are mentally abnormal, in which case the question arise whether they should not perhaps be treated

more leniently on that account. The difficulty with this suggestion is that the cognitive and conative functions of both psychopaths and sociopaths are relatively intact. Although their view of the world is probably not quite same as that of a normal person, they are capable of perceiving reality as it is. They have a normal range of intelligence and they do not suffer from delusions or hallucinations. When they commit crimes, they are usually aware that what they are doing is wrong by societal standards. Their problem is that they simply do not care. And, although they are undoubtedly impulsive, they are normally capable of controlling their behaviour when they choose to do so.”²⁵

Glanville Williams argues that “It would certainly be odd if a moderately wicked person were regarded as responsible and subject to punishment while a very wicked person were regarded for that reason as mentally sick and therefore exempt.”²⁶

Deprivation of knowledge of blameworthiness of conduct. This requirement is the alternative limb of the test of responsibility; alternative to the preceding limb. Under this limb, the defendant must show that the mental illness of which he says he is afflicted prevented him from knowing that his conduct is blameworthy. In other words, he must show that the deprivation of knowledge of the blameworthiness of his conduct was caused by the mental illness he claims to be suffering from. What is required under this limb of the defence is deprivation of knowledge that the act done is blameworthy, and not deprivation of knowledge of the nature and quality of the act done – the material circumstances and physical consequences of his conduct.²⁷ The only requirement is that the mental illness should have deprived him of knowledge of the blameworthiness of his conduct.

This limb of the insanity defence is concerned only with absence of *knowledge* of blameworthiness of the conduct. In this cognitive element the word ‘knowledge’ simply means awareness in the mind. It does not mean ‘understanding’, a term that has a wider connotation than ‘knowing’. A person

²⁵ Kemp et al., pp. 150-151.

²⁶ Williams, *Criminal Law: The General Part*, p. 536.

²⁷ For example, a person would not know the nature and quality of his act if he acted under a state of automatism, or if he used an arm to kill not knowing he was using the weapon at all. Further, Card (p. 137) gives the example of the person who cuts a sleeper’s head off because “it would be great fun to see him looking for it when he woke up”; and to an insane person who squeezes someone’s throat thinking that he is squeezing an orange. But a man who kills a boy mistakenly believing the victim is a girl knows the nature and quality of his act, being mistaken only as to the sex of the victim which is an immaterial mistake.

may know but not understand what he is doing. In other words, a person may be aware of what he is doing but does not appreciate it. For a person to appreciate the blameworthiness of his conduct, he must not only have knowledge of the nature of that conduct, but must also be able to evaluate it, and understand the implications for himself and others. But all that is called for under this limb of the defence is awareness, and not understanding, of the blameworthiness of the conduct.

The question is simply whether the defendant was aware that his conduct is 'blameworthy', whatever be the degree of blameworthiness. It is not clear whether 'blameworthy' in this context means legally blameworthy or morally blameworthy. It is trite law that ignorance of the law is no excuse. So, on principle whether or not the defendant knew his conduct to be legally blameworthy is immaterial. If the defendant knew that his conduct was morally blameworthy but did not know that it is illegal, he will have no defence inasmuch as ignorance of the law is no excuse. However, he may know that an act is blameworthy, but because of an insane delusion believe that the act is morally right, for example, that God, or the ancestors, commanded the killing; that his victim is the Anti-Christ that the Bible speaks of; that he is Abraham obeying a divine command from God to kill his son. Take this South African case study.²⁸ A man, 40 years of age, had had auditory hallucinations informing him that his wife was actually Satan and that she intended to kill him. He had developed a delusion that he was a prophet and that she had been sent to test his resolve. On various occasions, he had confronted her with her supposed perfidy, which she denied. Late one night he awoke, and feeling her evil influence, stabbed her repeatedly in the chest. Thereafter, he waited patiently for the police, to whom he calmly explained why he had savagely killed her. He was taken in for psychiatric observation. During the observation period, he spontaneously acknowledged that stabbing someone in the chest is wrong, but believed he was justified because he was a prophet and she intended to kill him. He was declared not criminally responsible for his actions.

On these facts, a court in this country would be inclined to conclude that the delusion did not deprive the man of knowledge of the blameworthiness of his conduct and that the insanity defence based on the aspect of deprivation of knowledge of blameworthiness of the conduct must fail. However, the result would conceivably be different where the man's condition can be characterised as an insane delusion, and hence, mental illness, of such a degree as to deprive the man of all will-power.

²⁸ Referred to in Kemp et al., p. 147.

‘Blameworthy’ is a much weaker term than ‘wrongfulness’. Every conduct that is wrong is blameworthy but not every blameworthy conduct is wrong. My refusal to give alms to the roadside beggar may be blameworthy but it is not wrongful. It might well therefore mean that the word ‘blameworthy’ does not mean contrary to law or forbidden by law but simply ‘evil’ or ‘bad’, whether it be morally or legally so. Such an interpretation would accord with the one adopted in the Australian case of *Stapleton v. R*²⁹. In that case the court took the view that the correct test (under the M’Naghten Rules which speak of the accused not knowing that what he was doing was ‘wrong’) is whether the accused could tell ‘good’ from ‘evil’. The court went on to observe that in most cases if an insane man knows that an act is contrary to law he will also know that it is wrong. *Stapleton* may have been decided in terms wider than, but not different, from the decision in the English case of *Windle*³⁰. In that case D suffered from a form of communicated insanity known as *folie à deux*. He killed his insane wife by giving her one hundred tablets of aspirin and then gave himself up to the police saying, “I am sure I’ll be hanged for this.” Medical evidence showed that he knew he was doing an act prohibited by law. He was thus not deprived of knowledge of blameworthiness of his conduct. He was aware of the legal blameworthiness of his act. The insanity defence failed and he was accordingly convicted.

The courts in this country have not yet grappled with this semantic problem but in other jurisdictions the view is that the insanity defence is concerned with legal wrongfulness because courts of law can only distinguish between that which is in accordance with law and that which is contrary to law. Besides, if an act is legally wrong, especially crimes *mala in se*, it is most likely to be morally wrong as well. Let it be supposed that a man kills another believing him to be a witch or wizard and believing that the law ordains the killing of witches/wizards. He has a credible defence if he can show that he was suffering from mental illness which deprived him of knowing the blameworthiness of his conduct. The defence succeeds albeit the rule that ignorance of the law is no excuse. The ignorance here is due to insanity and operates as an exception to the general rule.

The insanity defence is concerned with the legal responsibility of the defendant. It is, in other words, concerned with insanity in a legal sense and not with insanity in a medical or psychological sense or even with simply whether the defendant was medically insane at the time of the act or omission.

²⁹ [1952] 86 C.L.R. 358

³⁰ (1952) 2 All ER 1.

For, the law's conception of insanity is not necessarily what doctors, psychologists and psychiatrists may apprehend as insanity, although this does not mean that the courts reject expert evidence on the subject. Supposing a man working with a funeral parlour is caught having sex with one of the female corpses and it is later established that two other female corpses had been similarly violated.³¹ On a three-count charge of violating corpses, i.e., offering indignity to human corpses (s. 274(1)(b), Penal Code), the question might arise whether or not necrophilia is a form of insanity. The ultimate issue would be whether a person who engages in necrophilia is legally insane, and not whether he is medically insane.

§2. Procedural aspects

Evidence of medical expert. The purpose of the insanity defence is not to define psychiatric illness, but to determine who is or is not an appropriate subject for the criminal law. There is thus no all-embracing definition of insanity for medico-legal purposes. Courts are therefore impelled to seek expert medical evidence whenever the question of insanity is in issue in a criminal trial. Such evidence is generally accepted if there is nothing to throw doubts on it. The trouble, however, is that in almost every criminal trial in which the insanity defence is raised both the prosecution and the defence can find psychiatrists to state sharp differing opinions. This leads to brutal cross-examinations which distress medical experts for, often, their character, training and medical ability are impugned.

The law imposes no obligation on judges to call expert medical evidence on insanity. The court is therefore not bound to call such evidence, although it invariably does even though it is never bound by the opinion of the expert witness. Whenever recourse is had to such evidence the question at once arises as to whether it should be binding on the court. When called upon to give evidence on insanity medical experts generally testify to a triple conclusion. In the first part of the medical report the doctor makes a medical diagnosis of the illness or condition complained of. He inquires into the particulars of the symptoms from which the patient is suffering. From this premise he tries to determine whether or not the clinical manifestations amount to mental illness. If not he investigates the ancillary question as to what the ailing person is suffering from.

In this first part of the report the doctor must reach a conclusion, based on certain premises, as to whether the patient is suffering from a disease of the mind or not. In the second part of his report the doctor advances his opinion

³¹ An actual case of this nature was reported in the *Daily Dispatch (South Africa)* of Tuesday, 16 February, 2010, p.1.

as to the criminal responsibility of the patient. He ventures an opinion based on the conclusions reached at in the first part of the report, as to whether the patient may be held responsible or not for his acts. In the final part of the report the doctor gives the prognosis and further suggestions for treatment as well as precautions to be taken from the point of view of public safety. It is the second conclusion to which doctors testify that is a bone of contention between judges and medical experts. In this regard there are two competing views.

The first view is that expert medical testimony should be limited to the first and third conclusions. The proper duty of the doctor is only to ascertain the existence or non-existence of mental illness. He is not competent to say whether or not the mental illness so found to exist is sufficient to exclude criminal liability or not. The overwhelming majority of lawyers naturally favour this view. In many jurisdictions, therefore, it is the judge and not the medical expert who decides the issue of responsibility. The judge may admit psychiatric or other expert medical evidence as to insanity but he is not bound by that evidence. Nor is he bound to seek such evidence only from a psychiatrist. A psychologist, for example, may also be called upon to give evidence as to insanity. Medical testimony is confined to the issue whether the defendant was suffering from insanity at the time he committed the act. Thereafter, it is then up to the trial court to determine whether the disease so medically diagnosed as a disease of the mind amounts to insanity for legal purposes, that is, whether it is sufficient to exonerate the accused from criminal liability.

The second view, naturally espoused by medical doctors, is that not only must the medical expert determine the nature and incidence of the illness, but also he ought to be allowed to assess the criminal liability of the accused. This view is defended on the ground that it is the logical consequence of the fact that doctors alone have exclusive competence in carrying out a medico-psychological examination. The objection to this view is that its effect would be to reduce the role of the judge in this matter to that of merely rubber-stamping the medical decision and that in any case it would amount to a usurpation of a part of the judicial function by the medical expert under the thin disguise of expert medical testimony.

Ultimately, it is the court itself that must decide what weight to attach to the expert evidence and what conclusions to draw from it. For one thing, whereas mental health experts commonly diagnose and attach labels to abnormal mental conditions for purposes of classification and treatment, these labels will not necessarily correspond to what a court would regard as mental illness. In any event, an expert witness, even if he is well-respected, is not trained to evaluate evidence and make finding of facts in the same way a judge

is trained to do. In making its judgment, the court is guided by considerations of practical convenience, ordinary common sense, law, and medical opinion. The court's finding in this regard in a particular case is a finding of fact in each case and, as such, rules of judicial precedent do not apply. Each case is decided on its own merits and on the evidence adduced in that particular court.³²

In this country the medical expert is allowed to testify as to the criminal responsibility of the accused but the judge is theoretically not bound by such evidence. The judge may, in his discretion, admit or reject such evidence. In practice, once the medical expert certifies that the accused is suffering from mental illness and that certification is not challenged by the prosecution, the courts readily hold without further inquiry, that he is legally insane and therefore criminally irresponsible. This is what happened, for example, in the Bamenda Court of Appeal case of *Ambe Chrispus Forfang v. The People*.³³ Similarly, in *Ambe Christopher v The People*³⁴ the appellant's conviction for aggravated theft was set aside by the Bamenda Court of Appeal on the basis of a psychiatric report from the Yaoundé mental hospital known as Centre Jamot certifying that the appellant was insane at the time he acted. The attitude of the courts appears to be that medical insanity means the same thing as legal insanity. This is of course wrong.

Onus of proof of insanity. The law presumes every man to be sane. Therefore, whenever a defendant pleads insanity the onus is exceptionally upon him to prove that mental condition. He discharges that burden of proof by adducing evidence which satisfies the court that he was insane at the time of doing the deed, in effect a rebuttal of the presumption of sanity.

A defendant need not expressly plead insanity for the defence to become relevant at the trial and thus warranting the court to consider the defence and to rule on it. If the defendant puts his state of mind in issue and there is medical evidence relating to it, the defence of insanity becomes relevant and the court will then have to rule whether the evidence though not expressly introduced in support of the insanity defence nevertheless raises that defence. In the trial court, if the defence of insanity is made out the judge gives an ordinary acquittal setting the defendant free. He is not bound to order confinement in a special institution. In the first, place such an institution may not even exist. Secondly, even if it exists, the interest of the defendant or of society may not require protection by institutionalising the person concerned. Thirdly, section 43(1) of the Penal Code requires the judge to make a

³² Kemp et al., p. 145.

³³ (1975) BCA/1.c/75, unreported.

³⁴ (1974), Charge No. HCSW/3c/73, unreported.

confinement order only “where the liberty of the accused shall have been found by the court to be a public danger.” Harmless insane persons are therefore not confined.

Verdict and orders of the court. The insanity defence is concerned with the legal responsibility of the defendant at the time of his unlawful act or omission. Unlike the law of other jurisdictions, the law in this country as enunciated in s. 78(1) is not explicit that the insanity must exist at the time of the commission of the offence. But, arguably, that requirement is implied in the phraseology of the provision which is grammatically couched in the present tense: “... suffering ... deprives ... does...” This formulation makes it unnecessary to introduce into the provision the adverbial phrase of time, “at the time of”. Moreover, it is trite law that in determining the criminal responsibility of an accused the relevant moment to consider is the time of commission of the offence. It follows that the mental illness must have been present and active at the time of the unlawful conduct. It is immaterial whether the accused was mentally ill before or after his unlawful conduct.

A sane person may commit an offence and afterwards becomes insane, the insanity subsisting at the time of the trial. From the point of view of criminal responsibility, such a person stands in the same position as a person who is insane but who did an unlawful act during a lucid interval. On principle, each of them is fully responsible because the requisite mental element was present at the time the unlawful act was committed. However, instead of convicting and passing a custodial sentence, the court may, out of humanitarian considerations commit the insane person to a mental facility, if any exists, subject to periodical review; or, if his liberty would constitute a danger to the public, order his confinement in a special health institution (s.44, Penal Code). Alternatively, the court may simply release him if he presents no danger to the public.

Where a person commits an offence while insane but regains his sanity before the trial he cannot be held criminally responsible. The court must acquit him on the sufficient ground that he was insane at the time of commission of the offence. Similarly, where an unlawful act is committed during a period of insanity and the insane person afterwards becomes lucid, or appears to have recovered from his insanity, the court is bound to acquit him for the simple reason that he was insane at the time of the unlawful deed. But this does not necessarily mean he will walk out of the court a free person. The court is at liberty to order his confinement in a special health institution if it is satisfied that his liberty would be a public danger (s.43, Penal Code).

Where the insanity supervened during the trial but before judgment is passed, proceedings ought to be stayed for an inquiry into the mental state of the accused. Should medical evidence establish a pre-existing state of insanity, care would then be taken to ensure that the trial does not have an injurious effect on the mental state of the accused person. A person who is insane at the time of the trial is considered unfit to plead and to conduct his defence. This means the person is unable to understand and follow the trial and to give instructions to his counsel. In such a case, the trial court may acquit him on the ground of unfitness to stand trial. However, the court is bound to make a hospital order if satisfied that the person's liberty would be a danger to the public (s. 43, Penal Code). Alternatively, the court may make a hospital order for treatment, after which the person would be brought back to court to stand trial for his unlawful conduct. The law in this country is silent on this last point but not the law in some jurisdictions.

Where a sane accused person becomes insane after the court has convicted him and pronounced sentence, an appeal for review ought to, or might, lie. But where the prisoner becomes insane while serving his sentence, there is no compelling reason why he should not serve out the sentence. The practice in many jurisdictions is to move the prisoner so afflicted to a mental facility for treatment and upon being pronounced cured he may, at the court's discretion, be required to return to prison to serve out the remainder of his sentence. In this country, however, due to lack of mental facilities for the insane, insane prisoners are treated more or less like human flotsam and jetsam. They are kept in secluded cells until they have served their full terms.

Effect of successful insanity defence. The effect of a finding of insanity is that the accused is pronounced criminally irresponsible and is consequently acquitted. However, unlike cases of clean acquittals, the insane person does not get his freedom but is, in his own interest and in that of public safety, committed to a hospital to be cured or held until the court is satisfied that he presents no danger to society. The law distinguishes between sane mistake (cases of ordinary forgetfulness) and insane delusions. The distinction is made even though in both cases the actor does not know the blameworthiness of his conduct and is acquitted. However, there is a legal interest in making the distinction at this stage of the criminal proceedings. In the case of sane mistake the actor gets a clean acquittal while in the case of insane delusions his acquittal is followed by a committal to hospital.

In this country an insane defendant may, at the discretion of the judge or magistrate, be acquitted conditionally or unconditionally.³⁵ The critical factor to be taken into account by the court in deciding on conditional or unconditional acquittal is whether or not the insane person would constitute a danger to the public if released. By section 43 of the Code, where an insane person is acquitted of an offence punishable by imprisonment of two or more years, and the court comes to the settled conclusion that his liberty would be a public danger, the court must order his indefinite confinement in a special institution.³⁶ The same court may however terminate the period of confinement upon evidence by the competent medical authority that the liberty of the confined person is no longer a public danger. The same public danger test is applied in deciding the issue of confinement and the issue of release from confinement. There is no requirement that the confined insane person be released only after he has regained his sanity. Clearly, in this country, the primary reason for confining the insane person is protection of the public from serious harm and not treatment of that person.

Section 2. Intoxication

The Code defines neither ‘intoxication’ nor ‘involuntary intoxication’. It merely states what the legal effect of ‘involuntary intoxication’ is; and it does so by simply equating the effect of involuntary intoxication to that of mental illness. Section 79 provides laconically that “involuntary intoxication shall have the same effect as mental illness.” It is trite that:

“Alcohol is a drug which is capable of altering mood, perception or consciousness, of loosening inhibitions and self-control, and of impairing movements, reactions, judgment and ability to foresee consequences. Certain other drugs and substances (including some glues) can also have such effects.”³⁷

³⁵ Where the defence of insanity succeeds the court, in this country, must acquit. In England the jury returns the special verdict of “not guilty by reason of insanity” with the consequential internment in a mental institution. This amounts to the same thing as an acquittal. It was decided in *Felstead v. R* [1914] AC 534 that ‘guilty but insane’ was tantamount to an acquittal. An ancillary matter which the courts in this country have not yet pronounced themselves on is whether the acquittal of an insane defendant also means he is civilly irresponsible such that his estate cannot be distrained to compensate the victim of the offence.

³⁶ But this is subject to the availability of any such institution. If there is no available mental facility in the area the court would of course not make an order of confinement. In terms of section 93 of the Code sentence of penalty or measure shall vary according to the practical means of carrying it out.

³⁷ Card, p. 155.

In ordinary speech alcohol is distinguished from narcotic drugs such as cocaine, cannabis, heroin, hashish, hemp, marijuana, hallucinogens, opium, morphine, etc. Scientifically, however, alcohol is also a drug. Like other drugs alcohol acts as a depressant on the brain. It deadens the control centres of the brain thereby weakening or removing the inhibitions that normally keep us within the bounds of reasonable behaviour. Another effect of alcohol is that it also impairs the cognitive functions such as the ability to think and reason clearly, to form rational judgments, to perceive, and to foresee consequences of conduct.³⁸ Intoxication may also lead to the impairment of conative functions by reducing the ability to withstand temptation or provocation, and relaxing inhibitions. It commonly has an impact on the affective functions such as by causing changes in mood and emotions.³⁹ Poisoning the brain with alcohol or other drugs is usually a self-induced condition.

§1. Voluntary intoxication generally not a defence

Generally, if a person voluntarily commits an offence with the requisite mental element, the fact that he was intoxicated from voluntary or involuntary taking of alcohol or drugs will not save him from a conviction. It does not matter that he would not have committed the offence when sober. The point may be illustrated with the English case of *Kingston*⁴⁰. D had paedophiliac homosexual tendencies. He was in dispute with a couple. The couple arranged for X to obtain damaging information against D, which could be used against D. X invited a 15-year-old boy to his room. The boy was drugged by X and he fell asleep. While he was asleep D visited X's room and indulged in indecent acts on the boy. These were recorded by X. D's defence when charged with indecent assault on the boy was that he had been involuntarily intoxicated at the time because X had laced his drink. The judge directed the jury that they must convict D if they found that he had assaulted the boy pursuant to an intent induced by the influence of intoxication secretly induced by X and that it was not open to them to find that such intoxication of itself negated the *mens rea* required for the offence on D's part. D was convicted and the conviction upheld by the House of Lords.

Voluntary intoxication is thus not in itself a defence. Similarly, the fact that intoxication was induced by a third party does not without more constitute a defence. Intoxication may have impaired the defendant's power to judge between right and wrong. It may have relaxed his powers of self-control inducing him to readily give way to temptation. It may have made him unable

³⁸ Williams, *Textbook*, p. 416.

³⁹ Kemp et al., p. 164.

⁴⁰ [1994] 3 All ER 353.

to resist the impulse to act the way he did. It may have given him Dutch courage to act the way he did. It may have impaired performance. Nevertheless, he will still be accounted criminally responsible.

In fact, in some instances, intoxication may be a factor that aggravates rather than mitigates an offence. Thus, if a man deliberately makes himself drunk in order to give himself Dutch courage to commit an offence he cannot plead his self-induced intoxication to exculpate himself from criminal responsibility.

“If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the thing, and whilst drunk carries out his intention, he cannot rely on his self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that he was incapable of an intent to kill. So, also, when he is a psychopath, he cannot by drinking rely on his self-induced defect of reason as a defence of insanity. The wickedness of his mind before he got drunk is enough to condemn him, coupled with the act which he intended to do and did do. A psychopath who goes out intending to kill, knowing it is wrong, and does kill, cannot escape the consequences by making himself drunk before doing it.”⁴¹

This dictum is captured in the Roman-Dutch law rule known as *actio libera in causa*. The tenor of that rule is that, a person will not escape criminal responsibility for a crime committed by him if he deliberately becomes intoxicated in order to commit the crime, something he would otherwise not have had the temerity to do.

⁴¹ Per Lord Denning in *A-G for Northern Ireland v. Gallagher* [1961] 3 All ER 299. The facts of this case were that D, when sober, formed the intention of killing his wife. He then purchased a bottle of whisky, and drank some of it before killing his wife with a knife. At his trial he pleaded insanity and intoxication preventing him having specific intent. There was evidence that D was a psychopath, and that his psychopathy was a disease of the mind which would be aggravated by drink in such a way as to cause him the more readily to lose his self-control. The jury took into account D's state of mind before he took the whisky and convicted him. His conviction was quashed by the Northern Irish Court of Appeal but subsequently reinstated by the House of Lords. The House of Lords reasoned that D's psychopathy was quiescent and, without the drink, could not have brought the M'Naghten Rules into play because it merely weakened his power of self-control, and the defence of insanity could not be made good by getting drunk on whisky. It would have been different if D's psychopathy had been caused by drink and he had been insane within the M'Naghten Rules.

§2. Self-induced intoxication a defence in intentional crimes

By way of exception to the general rule, intoxication may constitute an absolute defence in respect of intentional crimes or where it leads to a disease of the mind. Self-induced intoxication would be a credible defence if it destroys the capacity to form an intention. The intoxication in such a case negatives the requirement of intention under section 74. With regard to non-intentional offences, however, self-induced intoxication would in fact constitute the requisite element of rashness or negligence, e.g., in the offence of dangerous driving, driving under the influence of drink or drugs, public drunkenness, being drunk and disorderly in a public place. Here, intoxication is the essence of the offence.

Another exception to the general rule is that voluntary intoxication would constitute an absolute defence if it results in mental illness. Intoxication is not in itself insanity. Mere malfunctioning of the mind due to intoxication does not constitute mental illness. However, intoxication may result in insanity. Habitual drinking or drug-taking can sometimes lead to such distinct mental illness as *delirium tremens* or alcoholic *dementia*. Such a condition brings intoxication within the terms of the insanity defence under section 78(1).

In the old English case of *Davis*⁴² D was charged with wounding with intent to murder. He raised the defence of insanity. Evidence adduced showed that at the time, although sober, he was suffering from *delirium tremens* resulting from excessive drinking. The judge directed the jury that “drunkenness is one thing and the diseases to which drunkenness leads are different things”. He went on to say that if a man by drink brought on a disease of the mind which caused a defect of reason, albeit temporarily, which would have relieved him from responsibility if it had been produced in any other way, he would not be criminally responsible. The jury was told to find a verdict of not guilty on the ground of insanity if they thought that D had been suffering from a distinct disease of the mind caused by drinking, but differing from drunkenness, and that by reason thereof he did not know that his act was wrong.

§3. Involuntary intoxication a defence where its effect is the same as insanity

Involuntary intoxication would constitute an absolute defence only where it has the same effect as complete mental illness. In other words, the involuntary intoxication, to constitute an absolute defence, must be such as deprives the actor of all will-power or of the knowledge that what he does is

⁴² (1881) 14 Cox CC 563.

blameworthy. It follows that for intoxication to succeed as an absolute defence it must be shown (i) that it was involuntary, and (ii) that it deprived the actor of all will-power, or of knowledge of blameworthiness. What was said concerning 'deprivation of all will-power' and 'knowledge of blameworthiness' when discussing the insanity defence applies, *mutatis mutandis*, to involuntary intoxication as an absolute defence. Intoxication is voluntary "where it results from the accused knowingly taking alcohol or some other drug or intoxicating substance (such as glue) or a combination of these, even though he does not know its precise nature or strength or even though the effect of the amount taken is much greater than would have been expected."⁴³

Involuntary intoxication, by contrast, is one that is not self-induced. It may be brought about by a third party such as when a person is forced to take an intoxicating substance against his will. Or, it may be brought about by the person himself such as when he takes an intoxicating substance without knowledge or reason to know of its intoxicating character. If a person takes medically prescribed medication which causes intoxication that would not be a case of voluntary intoxication. Similarly, if a person takes a drug that is non-dangerous in the sense that it is a drug not normally liable to cause unpredictability or aggressiveness, such as a sedative or soporific drug, and then is intoxicated, that would also not be a case of voluntary intoxication. In fact, the intoxication in these two cases is involuntary. However, if the person was reckless in taking the non-dangerous drug the intoxication will not be involuntary, but voluntary.

Since the involuntarily intoxicated person is not responsible for his condition the law declares evidence of that condition legally relevant. If the evidence shows that the involuntary intoxication has resulted in specific or general insanity the person has an absolute defence. But if the consequence of the involuntary intoxication is only partial then the person has only a partial defence, which means his responsibility will be diminished.

Section 3. Childhood

Children are intellectually immature and lack the necessary self-control to be held accountable for their acts. That is why the criminal law declines to hold them criminally responsible for their wrongful conduct. The full age of criminal responsibility by the law of this country is eighteen years. Section 80(4) ordains that a person aged eighteen years or over shall be responsible as an adult.

⁴³ Card, p.156.

For the purpose of criminal responsibility section 80 of the Code arithmetically distinguishes between three categories of children: those of less than ten years of age, those aged between ten and fourteen years, and those aged between fourteen and eighteen years. These age brackets are arbitrary and seemingly out of tune with current medical opinion and international law. It may simply have been pragmatically decided that as a matter of policy legal punishment ought to be administered to a child at some particular age.

The relevant age is attained on the anniversary of the person's birth. The court is enjoined by statute to look at the date of commission of the offence (not the date of the court's verdict) for the purpose of deciding whether at that time of the unlawful conduct the person had reached the relevant birth anniversary.⁴⁴

§1. Persons under ten years of age

Generally, society takes the view that a person under the age of ten does not have discretion and has not attained sufficient understanding regarding anything he does. An unyielding application of the doctrine of *mens rea* and of the presumption that a person realises and intends the natural consequences of all his acts would pose a predicament in respect of children of tender years because it would mean inflicting the full severity of the criminal law upon such children accused of crime.

Children used to be treated punitively. But quite early, the law in jurisdictions such as England agreed that very young children should not be punished for any crime. By the mid-twentieth century it was settled that complete immunity for the child ceased at ten years. A child under ten years of age cannot therefore be guilty of any criminal offence. This is so even if he is precocious or even if available evidence shows that he possesses a mischievous discretion and has in fact committed what amounts to a crime such as stealing, killing or a cybercrime. For, *ex praesumptione juris* (by an irrebuttable presumption of law), such a child lacks discretion and understanding; he is *doli incapax*, that is to say, he is incapable of criminal intent and also of having criminal negligence. No evidence to the contrary may be adduced. The effect of this irrebuttable presumption of law is that an under-10-year old is immune from prosecution.

The law on this subject is statutorily expressed in section 80(1) of the Code in these terms, "No criminal responsibility shall arise from the act or omission of a person aged less than ten years." This is an irrebuttable presumption cast

⁴⁴ Section 80 (5).

in statutory form. An infant under the age of ten is conclusively presumed to be totally irresponsible and therefore may not be tried for what he does. If the under-10 committed the act jointly with an adult the latter alone would be tried. By way of footnote, it may be recalled that even a child of less than ten years of age may be a competent witness in criminal proceedings, provided he is intelligent enough and appreciates the importance of telling the truth. One consequence of the section 80(1) irrebuttable presumption of law is that it would be illegal to arrest a child under ten for committing a crime. The police may simply administer a formal caution.

This does not mean that such a child cannot otherwise be dealt with. In the first place, the parents or guardians of the under-10 may be bound over to take steps to ensure that the infant does not repeat his behaviour. It is provided in section 48 that where a person under the age of eighteen shall have committed any act defined as an offence the court having territorial jurisdiction may require his parents, guardians or other persons *in loco parentis* to enter into a recognizance, with or without solvent sureties in such sum as may be fixed by the court, to ensure that the infant does not commit any similar act within the space of one year. In the second place, while a child under the age of ten cannot be the subject of punishment or of the preventive measures applicable to older children, nevertheless he may be the subject of special measures of care, control and protection. Care proceedings are not punitive.

§2. Persons between ten and fourteen years of age

A vestige of the irrebuttable presumption of lack of criminal capacity subsists with regards to boys below twelve years of age and in respect of sexual offences. There is an irrebuttable presumption of law that a boy below the age of twelve is, upon the ground of impotency rather than want of discretion, incapable of having sexual intercourse. A boy under the age of twelve cannot therefore be held criminal responsibility in respect of sexual offences involving sexual intercourse.

That specific situation apart, the law provides that “an offence committed by a person aged not less than ten years and not more than fourteen years may attract only such special measure as may, by law, be provided.”⁴⁵ It follows from a careful reading of this provision that a person is criminally responsible from the age of ten upwards and may be tried. The assumption would seem to be that such a person has sufficient powers of reason to know that his conduct was wrong. It is open to the prosecuting authority to lead evidence to show

⁴⁵ Section 80(2).

that despite the child's youth he did in fact have criminal capacity and can be held responsible for his crime.

However, the child cannot be convicted. He cannot be sentenced to a penalty or a preventive measure provided by the criminal law for adult offenders. This must be so even if the person is uncontrollable. In regard to this category of persons, the law eliminates punitive aspects, ousts the use of adult punishments and measures and provides special forms of disposal for them. Any person falling within this category may be the subject only of such measures as are specially provided by the law on juvenile delinquency. He may be cautioned and discharged, or released to his parents or guardians or persons responsible under customary law who may be required to enter into a recognizance, with or without solvent sureties, and in such sum as may be fixed by the court to ensure that the child does not commit another offence.

Alternatively, he may be placed on probation (if the system exists) or committed to a borstal institute (if any exists). In *The People v Samuel Bissong*⁴⁶, the accused, a thirteen years' old boy, was in the house with another boy, Stephen Ebot, and a third boy named Charles Takoh Ebai. The accused took a loaded Dane gun which was hanging on the wall in the house. He told the third boy, Charles Takoh Ebai, to lie down on the bed and he did. The accused pointed the gun at him and fired, killing him instantly. He and the second boy, Stephen Ebot, carried the corpse to the backyard intending to throw it into a pit latrine. But they were caught. The accused was charged with murder. He was convicted and ordered to be sent to the Buea Borstal Institute for three years on account of his tender years. It is submitted that the court erred in entering a conviction against the child. It should simply have cautioned and referred him to that reformatory school for counselling and education.

Section 4. Threats

Section 81 enacts:

“(1) No criminal responsibility shall arise from submission to threats, not otherwise avoidable, of immediate death or of grievous harm as defined by this Code ...

(2) This section shall not apply to a person who has voluntarily exposed himself to the risk of such threats.”

⁴⁶ (1973) Buea High Court, Charge No. HCSW/3c/73, unreported.

A threat is mental or psychological violence, a psychic assault creating the apprehension of immediate force. The threat is external to the recipient but operates internally in his mind. It is

“a proposal to bring about an unwelcome event unless the recipient of the threat does something ... where the proposal is made because the event is unwelcome and in order to induce the recipient to do the thing requested.”⁴⁷

In criminal law a general defence is available to a person who unavoidably commits an act under threat of immediate death or grievous harm to himself or to another. In some jurisdictions this defence is denoted as moral compulsion or threat of duress. The defence under the Code avails a person who is ordered to do something under threat of being killed or grievously injured and he submits to that threat by doing what the threatener orders him to do. The threat does not have the effect of making the act of the person involuntary. Its effect is simply that the person's will is overborne in that he would not have done as he did but for the threat.

§1. Threat of death or grievous harm

The threat made must be that of death or grievous harm. A threat of some other type such as a threat to expose immorality or corruption, or a threat of a less serious nature would not do. The threat of murder or grievous assault must be directed at the defendant and not at someone else. A threat of harm to property or a threat to kill or harm another person other than the defendant cannot amount to a defence under the section. Not even a threat to injure the defendant's wife and family would amount to a defence under the section. It seems rather harsh to have excluded the defence where a person commits an offence under threat of death or of grievous harm to a member of his family. In line with ordinary human attitudes, any person in this situation cannot reasonably be expected to act in a different way.

§2. Threat not avoidable

The defence is inapplicable where the threat is avoidable such as by playing for time or calling for help or escaping from the threatener or by removing the threat such as by overpowering the threatener or where there is opportunity for delaying tactics or for raising an alarm. In *Gill*⁴⁸ D was

⁴⁷ Smith SA, ‘Contracting under pressure: a theory of duress,’ (1997) 56 *Cambridge L.J.* 343, 346.

⁴⁸ [1963] 2 All E.R. 688.

convicted of stealing his employer's lorry. D raised the defence of duress (threat) that personal violence had been threatened against him and his wife if he did not steal the lorry. The defence failed because D had enough time in which to have raised the alarm. Likewise, under the Code the defence would fail on the sufficient reason that the threat was avoidable and D should not have submitted to it. The defence would not avail the defendant where the threat made to him had ceased to be operative at the time he committed the offence as where the threatener is killed, arrested or is otherwise incapacitated. Likewise, the defence has no place in a situation where the defendant commits a criminal act which the threat does not oblige him to.

§3. Threat of immediate harm

The threat must be of immediate hurt. The defence will therefore not stand where the threat of death or grievous harm is to be executed not immediately but later. A threat such as "If you do not do this-and-that you will die in three days time" or "If you do not do this-and-that you will see" will not excuse the defendant who submits to the threat. Similarly, if the threatener is not actually present and thus is not in a position to execute the threat the defence is unavailable. A threat delivered say over the telephone or by letter or email or other social media would lack the quality of immediacy required by the section. This is because in such circumstances the defendant's dilemma is not unavoidable. Between the dilemma of committing the offence or allowing the threatened harm to occur the defendant has a reasonable third safe avenue of escape open to him: there is time to eliminate or wreck the threat by raising the alarm such as by alerting the police.

§4. No voluntary exposure to risk of threats

Evidently the question of unavoidable threats of immediate death or grievous harm does not arise where the person has voluntarily exposed himself to the risk of such threats (section 81 (2)). Common examples are cases where the person voluntarily and with knowledge as to its nature joined a criminal gang, a cult, a secret order, an unlawful association, a conspiracy, or a secret society knowing that other members might bring pressure on him to commit an offence. The rationale for this rule is that no excuse should be available if the risk of threat was freely undertaken. In one case S joined a group dedicated to violence for political end. He was threatened with harm by other members of the group unless he commits an offence in furtherance of that end: *Sharp*⁴⁹. Held, that the defence is unavailable in such a case. Reasoning *à contrario*, S

⁴⁹ [1987] 3 All E.R. 103, CA.

would have had a good defence if he voluntarily joined the group not knowing that any of its members have a propensity to violence and therefore not suspecting any risk that he might be threatened with harm if he does not commit an offence, and therefore unexpectedly being subjected to such threats.⁵⁰ But supposing a community is afflicted by what is believed to be a pestilence from the gods and a person is under threat of death by a custom that requires him to kill a designated person for sacrifice to the gods to appease their anger against the community. Would the defence under consideration be available to Okonkwo who killed Ikemufuna in such circumstances?⁵¹

Section 5. Accident

“Section 77. No criminal responsibility shall arise from accident.”

A person is not criminally responsible for an accidental effect even if it arises from an unlawful act committed by that person. Section 77 provides dismissively and as if an afterthought that no criminal responsibility shall arise from accident.

§1. Meaning of accident

An ‘accident’ is an unexpected, an unplanned, effect or result of a voluntary act. In other words, the effect or result in question is a chance or fortuitous occurrence, one that is neither intended nor foreseen. Put in another way, the effect of an act is an accident if it is the unintended and not reasonably foreseeable consequence of the conscious conduct of a person. The plea of accident, that is, that an act or occurrence or event is an accident, is merely shorthand for saying that though the conscious conduct constitutes the physical element of the crime charged the prohibited consequence was neither intended nor foreseeable. It follows that it is not the act by the defendant that is an accident but the effect or consequence of the act that is: the act is intentional but its result or effect is unintentional.⁵²

§2. Illustrations

Many examples of accident come to mind. D aims a blow at B and misses and unforeseeably gets C instead. The hurting of C was an accident. D hits V

⁵⁰ Cf. *Shepherd* [1987] Crim LR 686, CA; Card, p.538.

⁵¹ Chinua Achebe, *Things Fall Apart*.

⁵² If the act is unintentional then the matter would fall under some other defence such as irresistible physical compulsion, threat, or insanity.

benignly on the head and V dies because of an abnormal condition in his skull which was unknown to D. The death is unintended by D and cannot have been foreseen by any reasonable person. It is an accidental event and D cannot be convicted of intentional or even unintentional killing. Take another hypothetical case. D and S who are friends have a unique way of greeting each other. D would sneak and punch S slightly on the left shoulder to make him aware of his presence. S would do the same. One night D and other friends of his are having a drink in a night club. S is not there. D sees a person who resembles S. He creeps behind him and punches him slightly on his left shoulder. In fact the person is P who has a weak heart. Due to his weak-heart condition P falls and hits his head on the ground. He dies instantly. P's death would be accounted for as an accident. Again, take this other example. A, B, and C are sitting in the front row of a truck. D throws a hammer at A which misses him and wounds B. The direct consequence of D's willed act, the wounding of B, is an accident.⁵³

As a further illustration of the operation of the defence of accident, consider the following cases, one from Papua New Guinea and the other from Queensland, Australia, in which the defence succeeded.⁵⁴ In *Timbu Kolian v. The Queen*⁵⁵, husband and wife were involved in a domestic quarrel. The husband got tired of the verbal exchanges. He went outside the house and sat down. His wife followed him there and continued to berate him. He picked up a light stick. As it was very dark he aimed a moderate blow in the direction of his wife's voice. He meant to chastise her. Unknown to him his wife was then carrying their baby in her arms. The blow struck the baby on the head and he died. It was unlawful under the law of that country for a husband to chastise his wife physically. It was held all the same that the husband is not guilty of manslaughter because the death was accidental. It follows from this case that a defendant is not deprived of the benefit of the defence of accident merely because his/her conduct is unlawful.

But in *R. v. Martyr*⁵⁶ M gave Y a blow and Y subsequently died from a haemorrhage. Medical evidence adduced at the trial showed that such a blow would not normally cause death, and that Y had a peculiar weakness. Held, by the Court of Appeal confirming the decision of the trial court, that M was guilty of unlawful killing. The Court reasoned that 'accident' does not include an effect or consequence resulting from a pre-existing physical condition, such

⁵³ Cf. *R. v. Tralka* [1965] Qd. R. 225, cited in Okwonkwo & Naish, p. 101.

⁵⁴ Cited in Okonkwo C O (ed.), *Introduction to Nigeria Law*, Sweet & Maxwell, London, 1980, p. 220 and in Okonkwo & Naish, *Criminal Law in Nigeria*, Sweet & Maxwell, London, 1980, pp. 98-101.

⁵⁵ (1968) 42 A.L.J.R. 295.

⁵⁶ [1962] Qd. R. 398.

as an inherent weakness, or an eggshell skull because death in such a case would be a direct and immediate consequence of the defendant's blow.⁵⁷ In the view of the Court, if a haemophilic bleeds to death from a small cut inflicted by someone, his death cannot be said to be an accidental outcome of the act. The judges reasoned that M would not have been guilty if he gave Y a slight blow and Y tripped over a floor-mat and fell, struck his head on a hard object, and died.⁵⁸ The learned judges sought to make a distinction between an unforeseeable supervening occurrence and an unforeseeable physical condition.

It is submitted that this is a tenuous distinction that does not hold water under section 77 because there, the test whether the result of an act, event or occurrence was accidental is that the result in question was neither intended nor foreseeable by a reasonable person in the shoes of the defendant. The death of Y in the example just mentioned was neither intended nor reasonably foreseeable by a reasonable person in the shoes of M. Under the section it is immaterial whether the result of the event is due to the inherent and not reasonably foreseeable weaknesses of the victim or it is due to supervening unforeseeable occurrences.

Thus, if the effect, whether or not resulting from an existing physical condition such as haemophilia, of an act is not reasonably foreseeable then it is an accidental occurrence. But if the effect of an act is reasonably foreseeable the plea of accident would fail. In a Nigerian case, *State v. Appoh*⁵⁹ two school boys A and B were pushing each other near a river. A third boy warned them that they were playing a dangerous game. Following a push by A, B slipped, fell into the river and was drowned. Held, that B's death was not an accidental event because a reasonable person would have appreciated the danger of pushing another near a river in the circumstances.

§3. Basis of the defence of accident

The defence of accident is already implied in the definition of criminal responsibility in section 74 (2). It appears to be based on the principle of no liability without fault. In *Hunt v. Maloney*⁶⁰ the servant of the licensee of a hotel,

⁵⁷ In other words there was no *novus actus interveniens*.

⁵⁸ It is submitted that in the example given by the judges the true basis for M's non-liability is that the chain of causation triggered by M's slight blow and leading to the death of Y was broken by a *novus actus interveniens*, the hitting of the head on a hard object, and not that the effect or consequence of M's act was accidental. The direct consequence of M's act was that Y tripped and because Y tripped he fell and falling, he hit his head on a hard object; and it is because Y hit his head on a hard object that he died. The peculiar weakness which Y had is irrelevant in the circumstance.

⁵⁹ [1970] 2 All N.L.R. 218.

⁶⁰ [1959] Qd. R. 164.

acting contrary to the instructions and without the knowledge of the licensee, served beer in an unwashed glass to a customer contrary to the requirement of the Health Act. Held, rejecting the argument that the offence was one of *strict liability*, that the licensee was not guilty of an offence because the servant's act of serving beer in an unwashed glass was an act which occurred independently of the exercise of the licensee's will.

When the section 77 defence is pleaded, the defendant is in fact asserting that the resulting harm of the intentional conduct was not intended by him. In other words, the defendant denies, on account of accident, that the other limb of the mental element (intentional result) requirement for criminal responsibility is satisfied. The defence is thus available only in cases of intentional crimes, that is to say, crimes in which the defendant though acting intentionally yet did not intend to produce the prohibited consequence of their conduct. In the Nigerian case of *Iromantu v. State*⁶¹ the deceased gripped the appellant's gun. In an attempt to recover it from him the appellant accidentally touched the trigger and the gun went off and killed the deceased. Held, that it was an accident and the appellant was not guilty of unintentional killing. The prosecution had failed to prove that the firing was voluntary or that the circumstances disclosed recklessness. Where the mental element of the prohibited consequence occurs in a way which would be described as negligent or reckless and it is shown that the defendant was negligent or reckless, the defence of accident would be unavailable.

Analytically, when accident is pleaded as a defence it is the case that the prosecution has adduced evidence tending to show that the act was committed with the requisite mental element both as to the act and the result of the act. The defendant, by producing evidence of accident, therefore seeks to negate the evidence that the result of the act was intended. Where the prosecution has failed to prove the mental element of the offence charged there is no point seeking to raise a defence, in this case, the defence of accident. The defendant will be acquitted simply on the basis that the prosecution has failed to prove the requisite mental element for the offence charged. For, in terms of section 74 (2) a person is criminally responsible only where he/she has intentionally committed each of the ingredient acts or omissions of an offence with the intention of causing the result which completes it.

The defence of accident speaks to the issue of lack of intention as to the consequence of the conduct. At the trial it is sufficient for the defendant to plead accident. He does not bear the burden of adducing evidence of accident.

⁶¹ [1964] 1 All N.L.R. 311.

It is therefore for the prosecution to rebut the defendant's contention by showing that the result was intended.

Section 6. Irresistible physical compulsion

A person is not liable in respect of physical movements over which he has no control. It follows that a person commits no crime at all and is able to rely on a general absolute defence if he lacks the physical power to control his act for whatever reason, e.g. the act is a reflex, spasm or convulsion; the act occurs while in a condition of sleep, unconsciousness, impaired consciousness, or hypnosis. The defence available to such a person is irresistible physical compulsion. Section 77 apart from dealing with the defence of accident also provides that "no criminal responsibility shall arise from ... irresistible physical compulsion."

§1. Requirements

Irresistible physical compulsion is an involuntary act induced by external physical force. It does not include conditions like loss of temper or abnormal or peculiar sensitivity. The defence is a concession to human weakness where the act or conduct is involuntary. No one is liable for an involuntary or unconscious act. In terms of the section, there must be compulsion. Further, the compulsion must be of a physical nature. Further still, the compulsion must be irresistible. This defence stresses the point that the compulsion (or impulse) to commit the act is strong and totally overpowering. If the defendant did not have the capacity to control his conduct or if, as it is said, he would have committed the act even if there had been a policeman at his elbow, then that would be a case of irresistible physical compulsion. A classic example is that of sane automatism.⁶²

§2. Sane automatism

Sane automatism is an unconscious involuntary movement of one's body or limbs. A sane automatist such as an epileptic⁶³ who strikes a person during a seizure or who gets a seizure while driving and so loses control of the motor vehicle he is driving and causes the death of another, acts under irresistible physical compulsion.

⁶² Where automatism results from a disease of the mind the automatism is said to be 'insane automatism' which means it is treated exactly as a case of insanity.

⁶³ Assuming that epilepsy is not considered a mental disease.

Similarly, a sane automatist such as a sleepwalker⁶⁴ who strangles his wife when sleepwalking⁶⁵, or a person under hypnotic influence who kills another, or a kleptomaniac who shoplifts, acts under irresistible physical compulsion. In *Kay v. Buttermworth*⁶⁶ Humphreys J said that a man should not be liable for resulting injuries if he lost control of the car he was driving as a result of being struck by a stone, overcome by a sudden illness, or attacked by a swarm of bees. Other cases of sane automatism are spasm, reflex action, convulsion, and cerebral tumour. In the English case of *R. v. Charlson*⁶⁷, the defendant was, until the incident in question, a model father. He struck his ten year old son in the head with a heavy mallet and threw him out of the window. His behaviour was caused by a cerebral tumour and therefore was automatist. Held, that he was not guilty of an offence.

But cases of non-psychomotor epilepsy, cases of hardening of the arteries leading to a congestion of the blood in the brain and a temporary lack of consciousness, and cases of unconsciousness due to hypoglycaemia (a condition which occurs when there is more insulin in the bloodstream than the amount of sugar there can cope with) have been held to be cases of insanity and not of sane automatism. In *R. v. Kemp*⁶⁸ a devoted husband violently attacked his wife for no apparent reason. He was suffering from hardening of the arteries which led to a congestion of the blood in the brain and a temporary lack of consciousness. Held, the defence of automatism raised must fail because this was a case of temporary insanity within the M’Naghten Rules. Also, in *R. v. Quick & Paddison*⁶⁹ and in *R. v. Clarke*⁷⁰ the defence of sane automatism failed. The defendant in that case, a diabetic and a nurse at a mental hospital, took prescribed insulin and then drank a quantity of spirits and took very little food. He became unconscious due to hypoglycaemia and assaulted a patient causing him bodily injury. Held, that the evidence supported a defence of insanity and not that of sane automatism. On appeal the decision was overturned. The Court of Appeal held that “A malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease [of the mind].” In the Nigerian case of *Republic v. Harmer*⁷¹ the

⁶⁴ Assuming also that somnambulism is not considered a mental disease.

⁶⁵ *Hill v. Baxter* [1958] 1 Q.B. 277.

⁶⁶ (1945) 61 T.L.R. 452

⁶⁷ [1955] 1 All E.R. 859.

⁶⁸ [1957] 1 D.B. 399.

⁶⁹ [1973] 3 W.L.R. 26.

⁷⁰ [1972] 1 All E.R. 219.

⁷¹ [1964] L.L.R. 36.

defendant was involved in a car accident which resulted in a death. He claimed that his erratic driving at the time was due to an attack of epilepsy. This claim was supported by medical evidence. Held, that the defence of automatism succeeded as the prosecution had brought no evidence to disprove it.

In the English case of *Bratty v. Attorney General for Northern Ireland*⁷² it was said that sane automatism is a defence “because the mind does not go with what is being done.” As Lord Denning pointed out in that case sane automatism is a defence not simply because the defendant does not remember it⁷³ or simply because he could not control it or simply because it is unintentional or its consequences are unforeseen. The defendant has no defence if he could reasonably have taken steps to prevent the conduct which he claims as ‘automatic’. If the driver of a motorcar realises he is getting sleepy but allows himself to fall asleep at the wheel he cannot escape responsibility for the consequences. Similarly, a somnambulist who knows that when he sleepwalks he seizes any knife that is lying about should, while in his waking state, ensure that there are no knives accessible while he is asleep.

The term ‘automatism’ is of course not used in the Penal Code. But it falls within the sort of irresistible physical compulsion covered by section 77. A person who acts under irresistible physical compulsion is criminally irresponsible because his act is not intentional (or voluntary). And since the act is unintentional its result is, *a fortiori*, unintentional.

§3. Interest in distinguishing between automatism and insanity

In a good many cases the distinction between automatism and insanity is not clear. Forensic medical evidence is often conflicting and the scientific community is hardly unanimous on the distinction between the two. In law, the interest in distinguishing between the two concepts relates to the issue of burden of proof and to that of criminal disposal. In insanity, the onus of proof is on the defendant since there is a rebuttable presumption of law that every human being is sane. But in automatism, while the defendant must at least adduce some genuine evidence of automatism, the general onus remains on the prosecution to prove the mental and the physical elements of the offence charged. As a trial strategy therefore, defence counsel would prefer to argue a particular condition as one of automatism rather than one of insanity. At the end of the trial, if the insanity defence succeeds the court would return a verdict of acquittal or, in England, ‘not guilty by reason of insanity’. However, rather than set the insane person free the court would commit him to a mental

⁷² [1963] A.C. 386 (H.L.).

⁷³ “Blackout,” said Stable J in *Cooper v. McKenna* [1960] Qd. R. 406, “is one of the first refuges of a guilty conscience and a popular excuse.”

facility for medical and psychiatric attention. This is done in the interest of public protection and of the mental health of the person concerned. Section 43 (1) provides that where a defendant is “acquitted for insanity” and his liberty is found by the court to be a public danger, the court shall order his confinement in a special health institution.

By contrast, where the defence of automatism succeeds the defendant is pronounced not guilty and is set free. Irresistible physical compulsion (automatism) is an absolute defence which means that if successfully pleaded the result is that the defendant is acquitted and set free. There is no provision in the Code which empowers the court to order the confinement of an acquitted automatist. This is another reason why defence counsel would prefer to plead automatism rather than insanity.

Section 7. Obedience to lawful authority

No criminal responsibility shall arise from an act performed on the orders of a competent authority to which obedience is lawfully due⁷⁴, provided that the order is not manifestly unlawful⁷⁵. The defence is available only where (i) the order that was obeyed came from a competent authority⁷⁶, (ii) the order that was obeyed was not manifestly unlawful⁷⁷, and (iii) the lawful authority in question is one to whom obedience is lawfully due⁷⁸.

§1. Competent authority

The order in obedience to which the defendant performed the act must be shown to have come from a *competent authority*. A competent authority is a public authority, whether civil, police or military, recognised under the law and vested with powers to issue commands of the type in question. An order from an incompetent authority will not avail the defendant who obeys it. For example, if the order comes from a private authority (as opposed to a public authority) such as an order from a parent to a child, a guardian to a ward, a spouse to the other spouse, a master to a servant, or an official of a private security company to a third party the defence under the section would be

⁷⁴ Section 83 (1).

⁷⁵ Section 83 (2).

⁷⁶ For example, an order from a non-judicial officer for a person to be imprisoned is not an order from a competent authority.

⁷⁷ For example, an order from whomsoever to torture or to subject a person to inhuman and degrading treatment or to murder or massacre people or to steal, is manifestly unlawful.

⁷⁸ For example, a military officer may be a lawful authority but it is not one to whom obedience by a civilian is lawfully due.

unavailable. The proper defence under the circumstances is the one provided under section 82. Similarly, an order from an illegal authority would not avail the defendant who obeys it. In the Nigerian case of *State v. Nwaoga*⁷⁹, a soldier in the rebel 'Biafran' army was ordered by his superior officer to lead two other soldiers to a locality in the hands of federal troops and identify the deceased, a former soldier in the rebel 'Biafran' army accused of sabotage, to those other soldiers who were to kill him. The accused obeyed the order and was subsequently charged with murder after the civil war. He pleaded superior orders. Rejecting the defence, the High Court held that the order was given by an officer of an illegal regime whose orders were necessarily unlawful.⁸⁰

§2. Authority to whom obedience is lawfully due

Even if the authority in question that issued the order is a competent one it must further be shown that that particular authority is *one to whom obedience is lawfully due*. In other words the authority must not only be a competent authority but also one which the person to whom the order is given is bound by law to obey. The law frowns on *ultra vires* acts and on usurpation of powers. The authority in question though a competent one must be one to whom obedience is lawfully due in the particular circumstance. If obedience is not lawfully due to that particular competent authority then there is no legal or moral duty to obey any order the person may give.

§3. Order manifestly unlawful

Further, even if the authority is a competent one, and one to whom obedience is lawfully due, the defence will still not avail the defendant if the order given by that authority is *manifestly unlawful*. However, such a manifestly unlawful order may constitute a partial defence under s.82 for an under-18 child or for an employee. Provided an order is not *manifestly* illegal, obeying it would be a credible defence. Whether an order is manifestly unlawful is a question of law. In considering whether an order is manifestly unlawful or not account must be taken of the nature of the act ordered to be performed, the circumstances in which the order was given, and the person of the defendant (his social and educational and cultural background etc). After allowance would have been made for all this, the result might well be the bringing into play of other rules of law that might indirectly provide the defendant with a

⁷⁹ (1970-1971) 1 E.C.S.L.R. 17 (High Court decision); [1972] 1 All N.L.R. (Pt. 1) 149 (Supreme Court judgment).

⁸⁰ On appeal, the Supreme Court upheld the conviction but on the ground that since the accused went into federal territory disguised as a civilian and appearing to be a member of the peaceful private population and committed an offence therein, he was liable to punishment like any other civilian.

defence. For example, the defendant might argue that the order given to him induced in him a mistake which resulted in him lacking the requisite mental element for the offence.⁸¹

The question whether an act is manifestly unlawful or not is apt to arise acutely in the case where an order, upon whose correctness it is impossible for the defendant to judge, is given to the defendant by someone within a hierarchy. In such a case the defendant cannot really be expected to question, but only to act upon it. What this shows is that orders can be, on their face ‘manifestly unlawful’ (and consequently a subordinate could be expected to refuse to obey). Within a police or military force the fact that officer **A** gives an order is probably reasonable grounds for officer **B** to believe it even when **A** himself has no reasonable ground for the order. Paradoxically, any taint the order had at the outset is removed by its being passed on since it is thought that within a hierarchy the subordinate must be protected by the orders of his superior officer, otherwise subordinates would be unlikely to obey their superior officers. Irrespective of the source of the belief, there is a significant moral difference between the defendant who does believe in a state of affairs in which they would not be committing a crime, and they who do.

An example of an order apparently lawful would be a warrant of arrest or remand signed by a committing magistrate in respect of a charge which could only carry a fine. Another example would be where a police officer shoots and kills or beats to death or severely injures a peaceful demonstrator or assaults and harasses the very citizens he is expected to protect. The police officer cannot be heard to say he acted on orders from his superior officer. For, even if he was ordered to shoot and kill the peaceful demonstrator or to beat him to death, to seriously injure him, to torture or otherwise subject him to humiliating, degrading and inhuman treatment, the order was clearly manifestly illegal and the officer should not have obeyed it. In the Nigerian case of *Ededey v. State*⁸², a chief officer of police led a detachment of the mobile police force under him on a widespread assault and looting spree in order to recoup himself of money stolen from his wife near a market. He was convicted of assault and theft. The other policemen who took part in the raid could also have been convicted had they also been charged with the same offences. The order given to them to assault and plunder other citizens whom they had a duty to protect was manifestly unlawful.

In some jurisdictions this defence is known as ‘obedience to authority’ or simply as ‘superior orders’. On the 8th August 1945 a treaty setting up the

⁸¹ Card, *op. cit.*, p. 549.

⁸² [1972] 1 All N.L.R. (Pt. 1) 15.

Nuremberg Tribunal was signed between the victorious Allies in World War II. The treaty excluded obedience to superior orders as a defence. In its decisions on the trial of persons accused of war crimes the Nuremberg War Crimes Tribunal therefore held that obedience to superior orders is not a defence. Since then the plea of superior orders has been excluded as a general defence in many jurisdictions and also in international criminal law in the context of crimes against humanity and military offences. The exclusion is based on the reasoning that the soldier is not an automaton and does not cease being a thinking human being and that generally, whatever the psychological evidence to the contrary, a person is supposed to exercise moral autonomy in deciding upon the moral quality of the act which they are ordered to perform.

Section 83 impliedly operates a distinction between an apparently legal order and a manifestly illegal one. Where the order is manifestly unlawful and it is nevertheless obeyed the person yielding obedience to it has no defence. But where the order is illegal but not manifestly so the person who obeys it can plead the section 83 defence. This appears to be a compromise position between two competing somewhat extreme schools of thought. On one extreme, is the view that a subordinate is expected to obey unquestioningly the orders of a superior including even unlawful orders. In so passively obeying the order of the superior, the subordinate is protected by the orders of his superior and is guilty of no crime. This appears to have been the rationale for the decision in *DPP v Smith* (1961) A.C. 290, a case which arose from events in the Boer Wars in South Africa. In that case a British army officer ordered a soldier under his command to shoot a Boer civilian if he did not fetch a bridle for his horse. The soldier obeyed the command by killing a Boer. He was acquitted of murder even though the order was clearly unlawful. The view that a subordinate is duty-bound to passively obey the orders of his superior is said to be good for military discipline. But clearly it is bad in a non-military context. Besides, even in a military context such blind obedience to orders has led to extrajudicial killings and violent crimes by soldiers in authoritarian states and genocide in countries such as Cambodia, Rwanda, former Yugoslavia, Sierra Leone, and Argentina.

At the other extreme is the view that a subordinate is not a robot or machine but an intelligent human being who must be able to assess the lawfulness of an order given to him before acting on it. If the subordinate comes to the conclusion that the order from the superior is illegal then the order must not be obeyed. If the subordinate obeys the unlawful or illegal order the plea of obedience to superior orders will not save the subordinate from a conviction. In the context of the military this view is considered somewhat unrealistic because it requires an individual soldier who is trained to

obey orders instantly and whose own survival may be at risk to consider the lawfulness of orders given to him and not carry them out if they are in fact unlawful, whether manifestly or not.⁸³

The section 83 defence is likely to be more relevant where the superior and the subordinate are members of the armed or police forces. In the South African case of *Smith*⁸⁴ it was held that: “if a soldier honestly believes that he is doing his duty in obeying the commands of his superior, and if the commands are not so manifestly illegal that he must or ought to have known that they are unlawful, the private soldier must be protected by the orders of his superior officer.”

Section 8. Lawful defence

“84 (1) No criminal responsibility shall arise from an act dictated by the immediate necessity of defence of the person acting or of any other person, or of any right of himself or of any other, against an unlawful infringement: Provided that the means of defence be proportionate to the seriousness of the infringement threatened.

(2) Intentional killing shall be proportionate to an act causing a reasonable apprehension of death, of grievous harm as defined by this Code, of rape or of sodomy.”

§1. General remarks

Lawful defence (private defence, as it is known in some jurisdictions) is a right conceded to everyone to defend themselves or other persons and to defend their rights or the rights of others, in the face of an unlawful attack or infringement. However, the defensive act must be dictated by an ‘immediate necessity’ to do so. There must be an immediate need, an emergency, for the act done in defence, and the defensive action must be reasonably proportionate to the seriousness of the threatened or actual unlawful attack or infringement. But there is no legal obligation on the part of a person to retaliate in defence of himself or others against an unlawful attack. However, should he choose to do so, he is guilty of no offence because he would simply be exercising a right available to him under the law. A rationalisation sometimes supplied for this absolute defence is that the person acting in lawful defence is compelled to do so out of the human instinct of self-preservation.

⁸³R Card, *Criminal Law*, 13th edition, Butterworths, London, 1995, pp. 548-549.

⁸⁴ (1900) 17 SCR 561.

Another rationalisation is that such a person is exercising a legal right and performing a duty in circumstances where public authorities are unavailable.

When two people are merely fighting and one kills the other the killing is unlawful homicide. But it is not always easy to distinguish between self-defence and fighting. In *R. v. Knock*⁸⁵ Lindley J. offered the following test:

“If a man attacks me, I am entitled to defend myself, and the difficulty arises in drawing the line between mere self-defence and fighting. The test is this: a man defending himself does not want to fight, and defends himself solely to avoid fighting. Then, supposing a man attacks me and I defend myself, not intending or desiring to fight, but still fighting – in one sense – to defend myself, and I knock him down and thereby unintentionally kill him, that killing is accidental.”

It should not escape notice that the section 84 defence conflates what in some jurisdictions are five separate defences, namely, self-defence, defence of property (e.g., from theft or burglary or destruction of property), defence of right (one’s right or the right of another person), defence of others, and prevention of crime. The defence of others or their rights is not limited to the defence of those to whom one stands in a special protectorate position. The section allows any citizen to come to the aid of another on the reasoning that an intervener stands in the shoes of the party on whose behalf they are intervening. Moreover, there is need to encourage greater citizen involvement in the defence of others because that would be manifesting social solidarity and more respect for the law, both of which are socially desirable values.

Thus, under the section it is lawful not only for any person to use reasonably proportionate force for the purpose of defending himself, his right or his property against an unlawful infringement. It is also lawful for any other person acting in good faith in aid of the victim of the attack to use reasonably proportionate force for the purpose of defending the victim.⁸⁶ In *State v. Agbo*⁸⁷ the deceased, using a machete, inflicted a fatal wound on one of the defendant’s sons and cut the other son on the knee. The defendant who witnessed this incident snatched the machete from the deceased and killed him. It was held that the defence availed the defendant. The defence would also avail a policeman who shoots and kills a man who, armed with a machete or other weapon, goes berserk and attacks people injuring them.

⁸⁵ (1877) 14 Cox. 1.

⁸⁶ *R. v. Duff* [1966] 1 All E.R. 62.

⁸⁷ (1973) 3 E.C.S.L.R. 4.

It follows that a person acting in lawful defence acts rationally. It should also not escape notice that the section 84 defence is relevant only where the retaliation by the defendant is a crime against the person. In other words the defence is relevant only where the defensive action is a fatal or a non-fatal assault and the defendant is thus charged with an offence against the person. By pleading lawful defence the defendant is saying in effect that the injury inflicted on the aggressor was justified. If the defendant destroyed property (and consequently is charged with an offence against property) in order to protect himself or another person or his property or another's property against an unavoidable grave and imminent danger, the proper defence available to the defendant is state of necessity and not lawful-defence. If A threatens B with a machete and B seizes it and inflicts a wound on A with it, B may plead lawful defence. But if B seizes the machete and destroys it the proper defence would be state of necessity.

§2. Requirements for the defence

‘An act’. Under the section a person may do whatever act is immediately necessary, including use of deadly force in some circumstances, to prevent the immediate unlawful imposition of harm to himself or to another or the right of himself or that of another. A person may thus kill, assault, arrest, imprison for a short duration, etc. in lawful defence. In *Kari Tizi Joel v The People* (1982)⁸⁸, the deceased, a soldier, went to the appellant's house and assaulted him by giving him a snake's beating with an army belt. The appellant reacted by knifing the soldier who died of the wound received. Self-defence was successfully pleaded.

‘Dictated by immediate necessity’. This requirement suggests that the law considers the defensive act as preventive measure rather than as punishment for the unlawful infringement. That is why the assailant remains punishable for the unlawful infringement even if he is injured by the defensive action. That is why also the defence is available even against a person who is criminally irresponsible (e.g. a minor, an insane person). It follows that retaliation after an attack has ceased would not be a defensive action but revenge.

Provided the act done was dictated by the immediate necessity of defence (as it appeared to the person acting, a subjective test), it is immaterial whether the said act reasonably appeared to be necessary or was actually necessary or honestly appeared to be necessary. If V threatens to hit D with what appears

⁸⁸ Criminal Appeal No. BCA/18.c/82, unreported.

to be a rock, D is justified in punching V to prevent the attack even though the rock was in fact *papier maché* and V only intended to scare D. Provided D honestly believed his act was necessary in response to an imminent actual attack, i.e. that there was an immediate need to act the way he did to avert the unlawful attack or unlawful infringement, he would be exculpated. Clearly, whether there was an immediate need to act or not can only be assessed from D's stance at the time D acted. The test can thus only be subjective and not objective.

There should not only be a necessity to respond to the infringement, actual or threatened. The necessity to respond must be immediate. The requirement of immediacy clearly suggests that D may take defensive action only if the circumstance is such that he must act at once to defend himself or another or the right of himself or that of another. In that case there is no requirement that he should run or retreat, even if he can. The law does not encourage cowardice. It cannot yield to injustice, and, retreat or escape, which is often shameful, cannot be a legal obligation. The defendant need therefore not retreat to spare injury to the person who precipitated the difficulty in the first place. Caught in a fight-or-flight situation he is entitled to opt to fight.

On the other hand, if there is need for lawful defensive action but that necessity is not immediate then D would ordinarily be expected to retreat on the sufficient rationale that there is no urgency in hurting a person when the threatened infringement can be avoided by running away or by calling for help. This may be thought to be a coward's rule. But the application of this 'retreat rule' is necessarily subject to some important limitations. Clearly, if D must retreat then he must know that he can do so in complete safety, otherwise he need not retreat but stand his ground and take defensive action. Similarly, if D may call for help but such a call would be futile in the circumstances, then D cannot be expected to retreat and seek help. The same reasoning applies where D cannot outrun or outwrestle his threatener or assailant. Further, it is doubtful that a person who is attacked in his home (or office or vehicle) need retreat even if there might be no urgency or immediacy in having to take defensive action. A person's home is their castle and their ultimate bastion of security. There is no place to retreat from there. Further still, if the attack or expected attack is of a minor nature and the contemplated retaliation is also of a minor nature it might well be that D need not run away but take defensive action.

Sometimes it is the case that the defendant is the one who first starts the incident by assaulting the deceased or provoking an assault from the deceased. In reaction to that initial assault or provocation of assault the deceased may assault the defendant with such violence that there is occasioned an immediate

necessity on the part of the defendant to take such defensive act as is proportionate to the violent assault on him. In such a case the defendant, even though he started it all, is not deprived of the section 84 defence. But the defence in such a case would not avail the defendant where the defendant first began the assault with intent to kill or to do grievous harm to the deceased because the person in a situation of self-defence is the deceased and not the defendant. What this means is that the necessity to act must not have been created by the conduct of the defendant in the immediate context of the incident which was likely or intended to give rise to the necessity. In other words, a person would not be able to invoke lawful defence if he has deliberately provoked an attack on himself or on another with a view to using force to prevent or terminate it.

Further, the defence will not avail the defendant where he endeavoured to kill or to do grievous harm to the deceased before the necessity of defending himself arose. It is otherwise where, before such need for self-defence arises, the defendant declined further conflict, and quitted it or retreated from it as far as is practicable, and he was pursued and the assault was continuing when the assailant was killed. If the assault on the defendant has ceased when he retaliates, his conduct is revenge and not lawful defence. If A assaults a child who runs to his father and tells him of the assault and the father comes and assaults A in turn, the father's action is not legitimate defence of another (his child) but revenge because there was no immediate necessity for his action.

Pre-emptive defensive action. Section 84 appears to have left open the question whether a person must wait until he has actually been attacked before retaliating or whether he may in reasonable anticipation of an attack take pre-emptive action against the prospective assailant. Sub-section (1) of the section speaks of "an act dictated by the immediate necessity of defence ... against an unlawful infringement." This language appears to suggest that defensive action is permissible only when there has been an actual infringement. But this construction would offend all common sense. Moreover, the proviso to sub-section (1) talks of "the infringement *threatened*." Therefore, reasonably interpreted, section 84 (1) covers both the case of *actual* and that of *threatened* unlawful infringement.

When a person is under actual attack he may legitimately fight back in lawful defence in order to put an end to the attack. In doing so he is fully entitled to use such force as is proportionate to the seriousness of the ongoing attack. S punches D and is raining blows on him. D is entitled to fight back to stop further blows from S. In doing so he may use against S such means as are proportionate to the blows being delivered. P shoots or stabs V. V is entitled

to retaliate in lawful defence by shooting or stabbing P. V may even go as far as killing P if V reasonably believes that P shot or stabbed him in order to kill him or to inflict on him grievous bodily harm. The Biblical 'turning of the other cheek' is not part of the law.

When a person is under threatened attack the defensive action against the threatener is analytically a pre-emptive action, an offensive act, since the threatener has mounted no actual attack yet. So long as there is a threat the person subject to that threat may take pre-emptive action against the threatener to wade off or remove the impending danger. He need not wait until there has been an actual attack because then it might be too late. The attack may be so murderous or so disabling as to remove the possibility of any defensive action against the attacker. That is the rationale for allowing pre-emptive lawful defensive action. However, the threat must be real, not merely imaginary. In deciding this question the court must consider the relative position of the parties and any past history between the two such as previous enmities, threats, assaults, and the like, if any.

Controversy arises in the case of 'defensive action' taken in a situation of anticipatory threat that is, the situation where there is as yet no threat but it is thought that there might be a threat or that a threat is very likely or probable. S believes B is likely to threaten him with death and without waiting for the death threat to be made pre-emptively kills B. It is doubtful that S would succeed in pleading the section 84 defence. The slaying of B would appear unjustified and S would be unlikely to escape a murder conviction. Even if S's belief is based on information or intelligence from an unimpeachable source the plea of lawful defence is unlikely to succeed for the simple reason that his action would seem too precipitate and that there is, in the circumstance, no immediate necessity to have taken it.

'Unlawful'. One therefore has to look at the nature of the attack or infringement and the nature of the defensive act done. In terms of the section the infringement must be 'unlawful'. An unlawful act is one without any legal basis and is not required or authorised by law. If the infringement is lawful, as where a police officer is making a lawful arrest or retaking a felon who has escaped from lawful custody the purported defensive action would be unjustified. But this requirement means D must be in a position to determine the lawfulness or unlawfulness of the infringement and so act only in the case of an unlawful infringement. In some cases the lawfulness or otherwise of an infringement might be apparent or easy to detect. In other cases it might not.

‘Proportionality of defensive act to the seriousness of the infringement’. The nature of the defensive act calls for an assessment of the extent of the act done to wade off the imminent attack. This relates to the question of proportionality. The law stipulates that the act done must be proportionate to the seriousness of the harm threatened. In extreme cases it would be easy to figure out that this act might or might not be proportionate to this or that harm threatened. But in most cases the question of proportionality would not be that apparent and in any case the defendant cannot in the heat of the moment be expected to measure finely his defensive act in such a way that it is proportionate to the infringement threatened.

In considering the issue of proportionality the court must therefore take into account the nature of the weapon used and the disparity in strength between the assailant and the defender. In *R. v. Igwe*⁸⁹, the deceased who was armed with a machete pursued the defendant. The defendant disarmed him and knocked him to the ground. Defendant received no injury himself. He killed the deceased with the deceased’s own weapon. It was held that the defendant had a good defence because he reasonably believed the deceased intended to kill him. The court reasoned that in the heat of the moment the defendant “may well have thought, and indeed not without reason, that he was engaged in a life and death fight with the deceased, if he could not kill the deceased he would certainly be killed by the deceased.” If a person made an error of judgment as to the amount of force he used in lawful defence he will not necessarily be denied the benefit of the defence. But this does not mean the section is a licence to use excessive or unreasonable force when acting in lawful defence.

Section 84 (2) encapsulates an irrebuttable presumption of law that intentional use of deadly force is proportionate to an act causing a reasonable apprehension of death, of grievous harm, of rape or of sodomy. Thus, if V threatens to kill or to grievously harm or to rape or to sodomise D and D reasonably fears that this will happen, D will be justified in killing V. D will all the more be justified in killing V if V did not merely threaten but actually tried to murder or grievously injure or rape or sodomise D. The test here of reasonableness of apprehension is an objective one. It follows that whenever lawful defence is pleaded on a charge of murder⁹⁰ it must be shown that the nature of the attack by the assailant (the deceased) was such as to cause a

⁸⁹ (1938) 4 W.A.C.A. 117.

⁹⁰ But not of capital murder because the commission of that offence requires a period of reflection or planning, which in the context of lawful defence will negate the requirement of immediacy.

reasonable apprehension of commission of any of the crimes mentioned in the subsection. The defence would accordingly not be open to a person who is abnormally nervous or excitable and who on being assailed by a comparatively minor assault, or an assault of a nature which falls short of any of those described in the subsection, unreasonably believes he is in danger of death, of grievous harm, or of rape, or of being sodomised. If V touches lady D's boobs or her bums or tries to kiss her and she pulls out a gun and shoots V dead it shall not lie in her mouth to plead lawful defence on the ground that she feared she was going to be raped. The killing under the circumstances is far disproportionate to the act of touching which, however indecent it might be, cannot be said to constitute a reasonable apprehension of rape.

It is a debatable question whether the offences mentioned in section 84 (2) are the only ones in respect of which deadly force may be used in lawful defence. It is submitted that the better view is that the category of such cases cannot be closed and that the four offences mentioned in the subsection are only illustrations of the sort of grave offences that may invited retaliation in the form of deadly force. Whether the use of deadly force in lawful defence can be justified in any other instances would depend on the nature and circumstances of each case. For example, an act causing a reasonable apprehension of infliction of a deadly disease (e.g., HIV, Ebola) or of an attack by witchcraft or other occult forces might, in a given culture, justify the use of deadly force.

If, while acting in lawful defence the defendant accidentally or mistakenly kills a person other than the assailant the killing is excusable.

In considering the question of the means of proportionality the court is bound to consider the circumstances in which the defendant believed he was placed, the relative disparity in strength (in terms both of physical power and of numbers) between the assailant and the defender, the degree of force and nature of the weapon used, the seriousness of the evil (i.e. the unlawful infringement) to be prevented, the possibility of preventing the unlawful infringement by other means (because the use of force can never be 'dictated by the immediate necessity of defence' if it was unnecessary), and the time available to the defendant for reflection. There must also be taken into account evidence of previous enmity, threats and assaults between the parties, if any. The reason is that although an instant assault standing alone may not be sufficient to cause an immediate necessity of defence, yet when considered in relation to previous enmities, threats, and assaults, it may do so.⁹¹ Even so,

⁹¹ Okonkwo & Naish, p. 223.

there must have been at the time of the retaliation an attack or a reasonable apprehension of an attack. If there was no attack or apprehension of an attack at the time of killing or infliction of bodily harm, then the requirement of immediacy is not satisfied and the case would be one of revenge rather than of retaliation. In the Canadian case of *R. v. Whynot*⁹² a woman killed her common law husband while he was asleep in his motor vehicle. The reason for the murder was that she and her children had suffered a pattern of abuse at his hands. In *R. v. Lavallee*⁹³ a woman had a physical altercation with her common law husband. Then as he was leaving her bedroom she shot him in the back of the head. She pleaded self-defence saying she was a victim of the battered woman syndrome. In both cases the plea of self-defence was dismissed in the Court of Appeal. A court in this country would arrive at the same result.

§3. Defence of property

The scope of section 84(1) is wide enough to permit defence of property, one's own or that of another, against an unlawful infringement. A person may thus prevent the forcible breaking and entering of his dwelling-house by any person whom he reasonably believes to be attempting to break and enter such dwelling-house for whatever purpose. The case of *R. v. Ebi*⁹⁴ is instructive. Fighting, which had nothing to do with the defendant, broke out between two sections of the community in a part of town where the defendant had almost completed a nice building. Defendant's house was ruined in the riot that followed. He salvaged some of his property. The next day, while he was in the house to remove some more of his property the riot continued and his house was pelted with stones resulting in further damage to it. Being exasperated, he took a gun belonging to his brother, fired at the crowd and killed someone. Held, that the defendant was entitled to be acquitted of the charge of murder on the ground that the killing was justifiable in defence of his property against the felonious attempt to destroy it.

§4. Burden of proof

The legal burden of proof of the state's case remains throughout on the prosecution. It is not at any time on the defendant for him to establish lawful defence though he will normally raise the issue of lawful defence where it is relevant. The defendant is entitled to an acquittal if the court entertains a doubt as to whether he acted in lawful defence.

⁹² (1983), 9 C.C.C. (3d) 449.

⁹³ (1988), 65 C.R. (3d) 387.

⁹⁴ (1936) 3 W.A.C.A 36.

Section 9. State of necessity (duress of circumstances)

“Section 86. No criminal responsibility shall arise from an infringement of a right of property, not justified as lawful defence under section 84, but inflicted in order to protect the person acting or any other person, or his or another’s property, from a grave and imminent danger not otherwise avoidable: Provided that the means of protection be proportionate to the harm threatened.”

A person may be induced or forced or compelled by another person or by circumstances to act against his will. Such a person acts under duress; that is to say, under pressure. Where the pressure, physical or moral, proceeds from a person it is denoted as duress by threats, or threats, simply. But where the pressure arises from circumstances it is denoted as duress of necessity. Duress of necessity, or necessity *tout court*, is a physical pressure. It occurs when a person is constrained by circumstances to act in a particular way. Here, and unlike in the case of duress by threats, the compulsion does not come from a person and is thus not accompanied by the threatening order, “do this or else”. The defence of necessity therefore arises where the defendant “is able to choose between two courses, one of which involves breaking the criminal law and the other some evil to himself or others of such magnitude that it may be thought to justify the infraction of the criminal law.”⁹⁵

Section 86 therefore exempts from criminal liability a person who infringes a right of property (i.e., any legal proprietary interest) in order to protect person or property from a grave and imminent danger (whatever its source, human or not) that could only be avoided by infringing the right of property in question. Provided that the means used to protect the person or property is proportionate to the harm that would have resulted from the grave and imminent danger.

Generally, in a necessity situation a man infringes a right of property to protect himself or another, or his property or another’s property against what is not an offence at all, but nevertheless threatens either himself or another whether in person or in property. The principle of necessity under the Code is thus concerned with the situation where the defendant alleges that he committed what would otherwise be an offence in order to avert a greater evil, and that this excuses his conduct. “In all human institutions,” noted Oliver Goldsmith in *The Vicar of Wakefield*, “a smaller evil is allowed to procure a greater good.” In the language of section 86, the defendant “infringed a right

⁹⁵ Smith & Hogan, *Criminal Law*, 3rd ed. 1973, p. 157.

of property...in order to protect the person acting or any other person, or his or another's property, from a grave and imminent danger not otherwise avoidable." The defendant who acts in a state of necessity is not compelled or threatened by anyone to infringe a right of property. In fact, where the grave and imminent danger is hanging over the head of the person himself, he may decide not to act at all and suffer its consequence.

§1. Explication

This defence involves, in Lord Goff's words in *Re F* (below), two groups of cases which in England have been called cases of public necessity and cases of private necessity. Public necessity occurred when a man interfered with another man's property in the public interest, such as the destruction of another man's house to prevent the spread of a catastrophic fire. Private necessity cases occurred when a man interfered with another man's property to save his own person or his own property from imminent danger.

Grave and imminent danger. In terms of section 86, there must be a grave and imminent danger to person or property, the protection of which can only be by infringing a right of property. The danger to person or property must be serious (not trifling) and impending. Further, the danger must not only be 'grave and imminent'; it must also be unavoidable, that is, one that cannot be avoided in any other way than infringing the particular right of property. The imminent danger may be one that threatens a person, such as risk to life, physical integrity, sexual integrity, and dignity. It may also be one that threatens property, such as risk of loss, damage, or destruction of property or other substantial interference with a right of property. The words "not justified as lawful defence under section 84" adds nothing to the formulation of the defence. Those words were probably inserted merely as a reminder that the defence of necessity is different from and independent of lawful defence. The reminder is intended to avoid confusion since the word 'necessity' also appears in the formulation of lawful defence in section 84.

Proprietary right. The expression 'right of property' includes both proprietary and possessory rights in relation to both movable and immovable property. The right of property infringed in order to protect one's person or property, or another's person or property may be any kind of proprietary right whether in relation to movable or immovable property or, on principle, to incorporeal property such as intellectual property. The infringement of the right of property must be proportionate to the looming danger threatening person or property.

Examples of necessity situation. Examples of necessity include cases where a person destroys an adjoining house in order to prevent a raging fire from spreading and consuming a bloc of buildings; where a person shoots and kills an animal in captivity about to maul another person; where a person smashes the door of a vehicle involved in a collision, to rescue persons trapped inside the vehicle. In one old French case, necessity was pleaded and accepted by the court where a mother stole bread from a bakery to feed her starving family.⁹⁶ In England, where the law provides for the relief of poverty, Lord Denning denied that necessity can be a defence to the theft of food and clothing because “if hunger were once allowed to be an excuse for stealing, it would open a door through which all kinds of lawlessness and disorder could pass.”⁹⁷ It is submitted that in this country section 86 of the Penal Code may be successfully pleaded in the case of theft of food to avert starvation provided the danger of starvation is “grave and imminent” and not otherwise “avoidable”.

But while there might be some merit in allowing the necessity defence in the case of theft of food to avoid the greater danger of starvation, it is generally accepted that the defence would not avail squatters who occupy uninhabited premises. The situation of squatters is not one of “grave and imminent danger not otherwise avoidable”. “If homelessness were once admitted as a defence to trespass,” said Lord Denning in the above case, “no one’s house could be safe. Necessity would open a door which no man could shut.”

There seems to be no direct authority on whether necessity can be pleaded in the face of state-sanctioned action or by the political activist, especially in the absence of “a grave and imminent danger not otherwise avoidable.” In one German case, however, the defence was rejected by the court in cases involving the mass killing of mental patients by two doctors acting under an unpublished order by Hitler in January 1939 permitting authorities “to grant a mercy death to persons suffering from incurable mental disease.” In its decision of 28 November 1952 the *Bundesgerichtshof* reasoned that had the doctors refused to participate in the killing of the mental patients they would not have found themselves in a situation that was at odds with the then

⁹⁶ *Affaire Ménard* (1899), D.P. II. 329, note Josserand; S. 1899. II. 1, note Roux.

⁹⁷ *Southwark London Borough Council v. William* (1971) 2 All E.R. 175. But the position is probably still open under that country’s Theft Act 1968. The requirement of ‘dishonesty’ in theft may have the effect of allowing the defence of necessity to be successfully raised. Proof of dishonesty in theft may be negated if the property is taken to avoid a greater evil, for example, to save life.

prevailing worldwide opinion of responsible physicians. In the view of the court, such physicians in many instances resigned from their positions as doctors in mental institutions rather than participate in the mass killing of innocent people.⁹⁸

Rationale. The rationale for the state-of-necessity defence appears to be that a person who acts in a necessity situation lacks the mental element required to make his act an offence. In *Reniger v. Fogossa*⁹⁹, Serjeant Pollard argued that

“in every law there are some things which when they happen a man may break the words of the law, and yet not break the law itself; and such things are exempted out of the penalty of the law, and the law privileges them although they are done against the letter of it, for breaking the words of the law is not breaking the law, so as the intent of the law not broken.”

§2. Proportionality of means of protection

Balancing of two evils. The proviso to the section stipulating that the means of protection must be proportionate to the harm threatened involves a balancing of the defendant’s conduct and the evil averted by it. This means the defence of necessity involves a test of balancing of evils. Firstly, it has to be determined whether the defendant was faced with an unavoidable choice between allowing some evil to occur and committing an offence relating to property. Secondly, it has to be determined whether the defendant, by committing the offence, did in fact avert an evil which was greater. The evil sort to be averted must always be greater than the offence committed.

Human life and the physical integrity of the person are always of greater value than any property. For that reason it is impermissible to inflict bodily harm (homicide or physical injury) in order to save property. That is why the section is confined to the infringement of a right of property. The defence does not apply to offences against the person, i.e. cases of infringement of the bodily integrity of the person in order to protect property or even another human being. It is thus unavailable in a *Dudley v Stephen*–type situation where a person kills and eats another to avert starving to death. In *Dudley and Stephens*¹⁰⁰ D and E were shipwreck seamen. They were adrift in an open boat with

⁹⁸ 6 *Neue Juristische Wochenschrift* 513 (1953).

⁹⁹ (1552) 1 Plowden 1 at p. 18.

¹⁰⁰ (1884) 14 QBD 273.

practically no food for 20 days. At E's instigation D killed the cabin boy who was with them. D and E then ate the boy's body. Four days later they were picked up. When they got back to England they were tried and convicted of murder, the sentence of death being later commuted to six months' imprisonment. In the view of the court 'necessity' is inapplicable as a defence to murder.¹⁰¹

Sacrifice of property. Only property may be sacrificed in order to protect a person or another property. As between infringing a right of property in order to protect a human being, a human being is always of greater value than property and so averting harm to the person is always a greater evil than the evil of infringing a right of property. That is why state of necessity would be a credible defence where, for example, a parent steals food to feed his child in order to protect it from dying of hunger. As between infringing a right of property in order to protect some other property, this would require an assessment of the monetary, aesthetic, cultural and emotional value of each in order to decide whether the property sacrifice was of less value than the property thus saved. This may not be that easy. But on the whole there must be reasonable proportion as between what is saved and what is sacrificed. There is no right to destroy a house, for example, in order to save a shack of small value or none at all. As in the case of lawful defence and provocation, however, mistake of fact may be relevant, subject to the proviso that the mistake may constitute negligence if negligence is punishable

Conduct justified. The language of section 86 ("no criminal responsibility shall arise") clearly indicates that the defence of necessity justifies conduct which would otherwise be unlawful. What is done under state of necessity is lawful because authorised by the law. The code comment under section 86 observes that the defence "does not however relieve [the defendant] from his civil liability to indemnify the third party who has suffered." This statement is not based on any provision of the Penal Code and there would seem to be no legal principle on the basis of which a person who does an act authorised by the law may be held civilly liable to a third party who has suffered damage. Why should a person who acts under duress of circumstance, be civilly liable to such a third party but not a person who acts under threat of duress or in lawful defence?

¹⁰¹ Card, p. 543.

Defence narrowly circumscribed. The principle of necessity under the Code provides a defence to conduct that is unlawful. The extent of the defence in the Code is very limited, in fact more limited than in England, for example. In *Re F*¹⁰², Lord Goff, speaking on a principle of necessity under the common law of England said:

“That there exists in the common law a principle of necessity which may justify action which would otherwise be lawful is not in doubt. But historically the principle has been seen to be restricted to two groups of cases, which have been called cases of public necessity and cases of private necessity. The former occurred when a man interfered with another man’s property in the public interest, for example ... the destruction of another man’s house to prevent the spread of a catastrophic fire. The latter cases occurred when a man interfered with another man’s property to save his own person or property from imminent danger, for example when he entered on his neighbour’s land without his consent in order to prevent the spread of fire onto his own land. There is, however, a third group of cases, which is also properly described as founded on the principle of necessity and which is more pertinent to the resolution of the problem in the present case. These cases are concerned with *action taken as a matter of necessity to assist another person without his consent*. To give a simple example, a man who seizes another and forcibly drags him from the path of an oncoming vehicle, thereby saving him from injury or even death, commits no wrong. But there are many emanations of this principle, to be found scattered through the books. These are concerned not only with the preservation of the life or health of the assisted person, but also with the preservation of his property (sometimes an animal, sometimes an ordinary chattel) and even to certain conduct on his behalf in the administration of his affairs.”

Specific statutory provisions on necessity. Although the defence of necessity under section 86 is confined to cases where a person infringes a right of property to avert a greater evil, specific statutory provisions may provide for the third group of cases referred to by Lord Goff in his judgment, i.e. cases concerned with action taken as a matter of necessity to assist another person without his consent. For example, section 283 of the Penal Code imposes a legal duty, under pain of imprisonment, on everyone “to render assistance to a person in danger of death or grievous harm, whether by his own endeavour or

¹⁰² [1990] 2 AC 1, (sub nom *F. v. West Berkshire Health Authority*, [1989] 2 All E.R. 545, HL).

by calling for help, where such assistance involves no risk to himself or to any other person.”

Furthermore, some offences make allowance, expressly or impliedly, for cases where the defendant acts under the stress of necessity. For example, section 339 provides a justification for abortion when performed by a qualified person and “proved necessary for the saving of the mother from grave danger to her health.” The operation of the section may be illustrated with the English case of *Bourne*¹⁰³. There, the defendant, an obstetric surgeon, performed an abortion on a 14-year-old girl who had been violently raped. Held, that he was not guilty of procuring a miscarriage. In *Re F* the House of Lords held it to be lawful to carry out a sterilisation operation on a mental patient with serious mental disability who lacked the capacity to consent, in order to avert the risk of her becoming pregnant by a patient with whom she had formed a sexual relationship, which would have had disastrous psychiatric consequences for her. In upholding the defence of necessity in this case Lord Brandon explained that¹⁰⁴:

“a doctor can lawfully operate on, or give other treatment to, adult patients who are incapable, for one reason or another, of consenting to his doing so, provided that the operation or the treatment concerned is in the best interests of such patients. The operation or other treatment would be in their best interests if, but only if, it is carried out in order either to save their lives or ensure improvement or prevent deterioration in their physical or mental health.”

Concurring with his learned brother, Lord Goff said:

“We are concerned here with action taken to preserve the life, health or well-being of another who is unable to consent to it. Such action is sometimes said to be justified as arising from an emergency ... Doubtless, in the case of a person of sound mind, there will ordinarily have to be an emergency before such action taken without consent can be lawful; for otherwise there would be an opportunity to communicate with the assisted person and to seek his consent. But this is not always so ... when a person is rendered incapable of communication either permanently or over a considerable period of time (through illness or accident or mental disorder), it would be an unusual use of language to describe the case as one of ‘permanent emergency’, if indeed such a state of affairs can

¹⁰³ [1938] 3 All E.R. 615.

¹⁰⁴ Case and judicial dicta cited in Card, pp. 546-547.

properly be said to exist. In truth, the relevance of an emergency is that it may give rise to a necessity to act in the interests of the assisted person without first obtaining his consent. Emergency is however not the criterion or even a prerequisite; it is simply a frequent origin of the necessity which impels intervention.”

Actual cases on the defence of necessity are extremely rare. This writer has not come across any in this jurisdiction. One reason for this is that in really deserving cases of necessity a person is normally not prosecuted but congratulated, so that there are hardly any judicial decisions on the point. When a person acts in a situation of necessity the deed is usually considered a heroic one and the person earns commendation rather than condemnation.

Defences of General Application: Partial Defences

Partial defences of general application are grounded on the concept of diminish responsibility. A finding of diminished responsibility is tantamount to a finding that an offence has been committed in fact and in law (there is legal guilt) but that the defendant's responsibility is partial and on that account he is entitled to mitigation of punishment. The defendant gets a reduced penalty in the manner prescribed in section 87 of the Code, independently of judicial discretion. When a defendant raises a partial defence he implicitly concedes that he has indeed committed an offence; but he argues that his responsibility for it is only partial because of the peculiarity of the facts involved. The success of the defence means that the defendant is saved from full exposure to the sanctions of the law. He gets off with a penalty less than he would have got if his responsibility were not diminished. The prefatory language used by the law in formulating each of the partial defences is, "responsibility shall be diminished..." Partial defences of general application are: partial insanity, s. 78(2); partial intoxication, s. 79; infancy, s. 80(2)(3); respect, s. 82; and provocation, s. 85.

Section 1. Partial insanity and partial intoxication

Some people are fully responsible while others are not. For example, a person aged above 10 but below 18 years is not fully responsible on account of his immaturity. Similarly, a person who has only partial mental capacity is also not fully responsible.

§1. Partial insanity

In legal terms, if a person suffers from such abnormality of mind as substantially impairs his mental responsibility for his conduct then he is not, in common sense, fully responsible. Where mental illness is only partial in the sense that the defendant is not completely deprived of all-will power or of knowledge of the blameworthiness of his conduct, the appropriate defence is partial mental illness under the provision of section 78(2). That provision declares that mental illness whose consequences are only partial shall diminish responsibility. It must still be shown that the defendant suffers from a degree of mental illness. His will-power or knowledge of blameworthiness of his conduct is affected, but without being completely destroyed. The defendant

suffering from partial unsoundness of mind must be convicted of the offence he has committed. However, when it comes to sentencing, the sentence incurred is reduced in the manner prescribed by section 87. The reduction of sentence is without prejudice to the power of the court, acting under section 44, to order confinement of the partially insane person, in the public interest.

A person suffering from mental illness that does not fully deprive him of will-power or of knowledge that what he does is blameworthy suffers from partial unsoundness of mind. His criminal responsibility is not full but diminished. This has not always been the position of the law. Partial unsoundness of mind was previously not a defence to a criminal charge. It was only a factor which the court, in its discretion, could consider as a mitigating factor.

§2. Partial intoxication

A person may be insane by reason of intoxication. The same principles regarding partial mental illness necessarily apply in respect of intoxication, voluntary or involuntary, whose consequences are only partial in that they do not completely destroy the capacity to have the mental element of an offence. Consider *Kofi Mensah v. R*¹, a case from Ghana. D who was disappointed in love drank 'illicit gin'. Later in the day he invited the woman in question to go and pick mushrooms. On the way they stopped at her uncle's farm. There, he drank some palm wine. He was carrying a gun when they got to the place where the mushrooms were. The drink he had taken began to affect him and he recollected nothing more until he found himself lying beside her, covered in blood. He made an abortive attempt at suicide, and then surrendered himself. This evidence was not disputed by the prosecution. Held, the conviction for murder must be quashed and substituted with one for manslaughter because the whole conduct of the accused negative pre-conceived intent.

Section 2. Infancy: children aged 14 to 18

Under section 80 (3) the responsibility of any person who falls within the 14 – 18 year age bracket is diminished. As in the case of the under-10 and the 10-14 years age-groups, there is no magic about this age bracket but it illustrates the necessary arbitrariness of the legal concept of criminal responsibility regarding when to hold a child criminally liable for an offence.

¹ (1952) 14 W.A.C.A. 174.

§1. Conviction followed by a reduced sentence

A person aged over fourteen and below eighteen years who commits an offence gets convicted for the offence, but benefits from a reduced sentence on account of his immaturity. In *The People v Cletus Che* (1976)² the accused was convicted of aggravated theft. In sentencing him the trial Judge, Inglis J, granted him the benefit of diminished responsibility resulting from the successful plea of a partial defence (s. 87), in this case the plea of infancy. In yet another case, *The People v James Okonkwo Ikechuku & Godwin Bang Ofon* (1973)³, the accused, both of them youths, broke into a petrol filling station after inflicting grievous bodily harm on the security guard at the station. Both were convicted. In passing sentence the court took their young age into account as a mitigating factor. In *The People v David Efukani* (1973)⁴ a house in Victoria was broken into at night through the back door and certain chair cushions were stolen. The police later discovered the missing items at an auction sale and the accused, a juvenile aged more than 14 but not yet 18, was eventually arrested and charged with aggravated theft. He pleaded guilty and was convicted. However, his responsibility was diminished on account of being a juvenile. In sentencing him the court invoked the provisions of section 87(1)(a)(2) in his favour.

§2. Ancillary court orders

An offender aged above 14 and below 18 is amenable to other action by the court. For example, the court may make one of a number of orders. It may order the parents to give an undertaking to exercise proper care and guardianship. Section 48 of the Penal Code empowers the court to bind over the parents or other persons responsible for the under-18. The section provides that where a person below the age of 18 has committed an offence the court may require his parents or other persons in *loco parentis* to enter into a recognizance, to be forfeited if the under-18 offender commits any similar act within the space of one year, unless the obligor, as the person who bound himself by that recognizance bond, proves that he took all reasonable steps to avoid the minor's committing the offence.

The court also has jurisdiction under the law on juvenile delinquency to commit the under-18 to the care of a fit person. It may even place the child on probation or commit him to a borstal institute or a reformatory school, if any of these facilities exists. It exercises this jurisdiction in the best interest of the child himself bearing in mind the need for reformation and re-education of

² Buea High Court, Charge No. HCSW/51c/76, unreported.

³ Buea High Court, Charge No. BM/181/73, unreported.

⁴ Buea High Court, Charge No. HCSW/3c/73, unreported.

young offenders and the desirable objective of removing the stigma of criminality from young people.

Section 3. Respect

Section 82 provides that responsibility is diminished for an under-18 who commits an offence under the *compulsion* of his parents or other person *in loco parentis*.⁵ Similarly, responsibility is diminished for an employee or a subordinate who commits an offence under the compulsion of his employer or superior. This partial defence is denoted in some jurisdictions as *respondeat superior* and is in some ways akin to ‘instigation’.

§1. A defence of moral compulsion

Section 82 does not expressly denote the defence as moral compulsion but it is necessarily so and cannot be anything else for the simple reason that the offence is captioned ‘respect’. Respect is an attitude of deference, esteem, consideration or reverence. It is a psychological frame of mind and does not completely destroy the actor’s will-power even in a case of profound respect or reverent fear. The rationale for making this a partial defence is that persons who are envisaged by the section act under the moral compulsion of those having and exercising power over them.

§2. May be urged as an absolute defence under ss. 77 and 83

Where the compulsion is physical the proper defence would be physical compulsion under section 77 which is an absolute defence because such compulsion destroys the actor’s will-power and frees him completely from liability. The section-82 defence is akin to that of superior orders. Therefore, if the subordinate acted on orders received from a parent or other person *in loco parentis*, or from an employer, as the case might be, the section-83 absolute defence of obedience to lawful authority may be pressed into service, provided the order is not manifestly unlawful.

Section 4. Threats: proviso to section 81 (1) (duress by threats)

The proviso to section 81 (1) states that where, in submission to threats, not otherwise avoidable, of immediate death or of grievous harm, a person commits an act defined as an offence punishable with death or that has resulted in death or in grievous harm, the responsibility of that person shall be

⁵ See, s.80 (3) and cf. s.29.

merely diminished. A person who, in submission to unavoidable threats of immediate death or grievous harm and in order to save himself, commits a capital offence or an act that has resulted in death or grievous harm, does not escape a criminal conviction. He will be convicted, but his responsibility will be diminished, entailing a reduction in the sentence for the offence.

§1. Rationale for duress by threats as only a partial defence

X threatens Y with immediate death or grievous harm to himself if Y does not obey X's order to do a specific act. The only way Y can avoid that threat is by doing the act in question, which constitutes an offence punishable with death or which results in death or grievous harm. Y will not go free even though he did the act under threat to his life or physical integrity. He remains criminally responsible. However, that responsibility is diminished on account of the threat held out to him. The proviso to section 81 (1) in effect teaches that a person may not, in order to save himself from unavoidable threats of immediate death or grievous harm, commit a capital offence or murder or grievous harm. Concretely, if the threatener requires the person threatened to commit a capital offence or an offence of grievous harm, then the latter should have the firmness to decline to do so and should have the fortitude to face death or grievous harm.

The law attaches supreme importance to the protection of the life of an innocent person. Therefore, the person threatened should instead be a hero and not sacrifice an innocent person to save his own skin because that would be assuming a power to decide who should live and who should die. By saving his own life he would in effect be making an illegitimate value judgment that his own life is more important than that of another person. If therefore he chooses to sacrifice an innocent person he will not escape a conviction, though when it comes to sentencing he will get a reduced sentence in the manner prescribed in section 87.

§2. Limited scope of this partial defence

This partial defence is very limited in scope. It would avail a defendant only where he has committed homicide or grievous harm or a capital offence under unavoidable threat of death or grievous harm to himself. The person threatened must believe that there is no way of escaping the execution of the threat against him, other than to commit the homicide or grievous harm or capital offence. The partial defence would not avail the defendant if the threat was avoidable such as by calling for help or escaping or temporising.

Moreover, the defence is unavailable to a person who has voluntarily exposed himself to the risk of such threats as for example where he voluntarily joined a criminal gang or association or a secret society. Where the offence committed by the person threatened is of a less serious nature, say a simple offence, the proper plea is absolute defence under section 81 (1) and not the proviso to the subsection.

Section 5. Provocation

The only partial defence of general application referring to facts external to the defendant is provocation. This defence is provided in section 85 of the Penal Code. It is available where a person commits an offence in immediate reaction to an unlawful act by another against him or, in his presence, against any person to whom he stands in a special protectorate position⁶ and on condition that the reaction is proportionate to the provocation. The defence when successfully pleaded, diminishes responsibility and reduces the punishment of the person impelled by provocation to commit an offence.

§1. Unlawful act

A lawful act is not provocation to any person. Therefore, the person pleading provocation must, if he is to succeed, show that the provocative act was unlawful. In *DPP v. Camplin*⁷ the accused, a boy of 15, killed the deceased by striking him on the head with a frying pan because the deceased had buggered him against his will and then laughed at him as a result of which he lost his self-control. He was charged with murder and pleaded provocation. Held, that the defence of provocation succeeds because a reasonable man “is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused’s characteristics as [the jury] think would affect the gravity of the provocation to him.” On these facts, the defence of provocation would also succeed under the Code on the sufficient reasoning that the killing was proportionate to the homosexual assault (an unlawful act) on the 15-year old.

An unlawful act committed against property, whether of the defendant or of any of the persons mentioned in the section, eliminates provocation as a line of defence. The defence requires it to be shown that an unlawful act was committed against bodily integrity – that of the defendant or of any person

⁶ Spouse, child, parent, brother, sister, master, servant, minor, or an incapable under his charge; that is, a person to whom defendant stands in a conjugal, parental, filial, or fraternal relation; or in the relation of master or servant

⁷ [1978] 2 All E.R. 168.

within the class of persons mentioned in the section. Where the unlawful act relates to any person within the class of persons mentioned in the section the defendant must further show that the act was committed “in his presence”. That phrase does not necessarily connote that the defendant should have witnessed the physical assault being made. The act done by the provoker to any person within the class of persons mentioned in the section would be in the presence of the defendant even if the defendant was not looking or even if he was some distance away.

It might be thought that the requirement of unlawful *act* suggests that mere words alone, however insulting, would not amount to provocation under the Code; and that even informational words like “I just raped your wife” or “I just buggered your son” will not do either. But this is doubtful. There is an infinite range of methods of provocation and there could be no plausible rationale for excluding words, gesture, cry, song etc from provocative acts. Speaking or uttering words or making a gesture is an act. Therefore, provided the words uttered or spoken (even in the form of a song) are unlawful in the sense that they amount to an offence, there is no reason why they may not be considered as capable of amounting to provocation.⁸ In *R. v. Adelodun*⁹ D’s cousin lost a local council election. D was provoked by abusive songs against his family. He lost his self-control and killed one of the singers with a machete. The post-mortem examination revealed that the deceased had about ten wounds some of them very severe. It was held that the plea of provocation failed. But this was not because words or songs cannot constitute provocation but because the mode of retaliation was out of all proportion to whatever the deceased said or did to D.

In *The People v. Akoffei Joseph*¹⁰ the accused and his wife, Elizabeth Andoshu, had an altercation. This happened when Elizabeth, on returning home on the day in question found the accused feeding the baby she had had out of an adulterous connection with a certain Martin. She taunted him by saying he was “as black as the children he had with her” and warned him to desist from ever touching with “his black and dirty hands” her baby by Martin. According to the evidence of the accused, after Elizabeth made these insults she grabbed a machete intent on attacking him with it but he seized it and

⁸ Cf. sections 153 and 154 which punish contempt of certain high state officials and public bodies, section 241 which punishes contempt of race or religion and section 270 which punishes contempt of minister of religion, and section 235 of the Code which punishes any seditious cry or song uttered in any place open to the public, section 264 under which it is an offence publicly to utter any immoral song, cry or speech and section 266 which punishes ‘other objectionable publications.

⁹ [1959] W.N.L.R. 114.

¹⁰ (1975) Charge No. HCSW/25.c/75, unreported.

delivered a fatal blow on her with it. The charge was capital murder and the defences were provocation and self-defence. Njamnsi J held that neither defence succeeded, but did not say why. On the other hand he was unable to agree with the prosecution that the killing was premeditated. The accused was accordingly convicted of simple murder and sentenced to life imprisonment.¹¹ It is not clear from the judgment why the court held that the plea of provocation failed. But a rationalisation of the decision would be that an insult *per se*, especially of the hyperbolic type coming from a loquacious spouse and meant to irritate and annoy the other, however provocative it might be, is not unlawful. Moreover, it can be expected that a sober person of reasonable firmness or fortitude, sharing the characteristics of the defendant would not react as he did to the verbal abuse coming from the rough side of the tongue of an angry woman.¹² Similarly, the plea of self-defence could not possibly stand for several reasons. The defendant's evidence of the deceased having grabbed a machete intent on attacking him was too far-fetched to be believed by the court. The verbal abuse from the victim was not an 'unlawful infringement'. Even if it was, the slaying of the victim was far disproportionate to the verbal 'attack' and, in any event, was not dictated by the immediate necessity of defence of the defendant.

The considerations regarding words and songs also apply to publications. If A makes a libellous publication against B who reacts by assaulting A, there is no reason why the libellous publication would not be considered an unlawful provocative act.¹³

§2. An offence immediately provoked

The defendant must show that his reaction in committing the offence charged (be it an offence against the person or an offence against property) was immediate. This means that his reaction must be spontaneous: there was no cooling off period; the defendant acted in the heat of passion. The defence of provocation will not succeed where as between the provocative act and the retaliatory or reactive act enough time has elapsed for passion to cool, as

¹¹ See also: *The People v. Ama Chukwu* (1975), Charge No. HCSW/7.c/75, unreported. There the defence to a murder charge was also provocation by insults; *The People v. Elias Ngini* (1975), Suit No. HCSW/17.c/75, unreported, where the charge was capital murder and because the evidence pointed to the fact that the killing took place 'in the heat of the moment', Inglis J convicted the accused of simple murder and gave him life; and *The People v. Ngu Barnabas* (1987).

¹² The story is told of a Greek philosopher who declined to react to his wife's insults and taunts. His continued silence in the face of her provocations exasperated her. She fetched a pail of water and poured it on him. His only reaction was to say, "After thunder the rain comes."

¹³ Cf. section 305 which punishes defamation and section 307 which punishes abuse.

where after the provocative act the person provoked went to his house some distance away, got a weapon, returned and killed the provoker or where a man after finding his wife committing adultery went out, returned some four hours later and killed her.

In *R. v. Green*¹⁴, the wife of the accused having left him went to stay with her mother where she began to accept the advances of Y. The accused tried hard to win back his wife but failed. At about 9 p.m. one evening he visited his mother-in-law and found his wife and Y having sexual intercourse. He returned to his house to brood over his misfortune. At about 1 am he took a machete and returned to his mother-in-law's house to kill Y if he was still there. He found his mother-in-law snoring and heard his wife and Y talking in a dark room. He struck twice on the bed and killed his wife. The mother-in-law was also killed when she ran into the room. On a charge of murder the accused pleaded provocation, but this was rejected because between the provocation and the killing enough time had elapsed for his passion to cool. Clearly, if he had killed the couple at 9 pm when he first saw them the plea would have succeeded.

In determining whether there has been enough cooling time it is proper to take into account the degree of provocation offered. For, the more serious the provocation the longer will be the time required for passion to cool. In deciding whether an unlawful act is provocative, sometimes it is legitimate to take account of previous wrongful acts by the provoker against the person provoked. This is important for the purpose of determining whether the last wrongful act amounted to sufficient provocation. The last act, viewed in isolation, might be trifling but it could be the last straw in a cumulative series of incidents which finally broke down the self control of the accused and induced him to react in the heat of passion.

In *Thuku (alias Nyaga) v. Republic*¹⁵ the appellant came home in a drunken state one night and found his stepfather, the deceased, beating his mother. He tried to separate them and the deceased hit him twice on the head with a stick warning him not to interfere in a fight between husband and wife. The appellant then went indoors, slept for a few hours and woke in response to the deceased's call. He went outside and found his mother dead with a severe head injury and saw the deceased some distance away. He then moved his mother's body to a shade, took a *panga* (a short spear used in Eastern and Southern Africa) from the house and chased the deceased to a house about three hundred yards away. They then exchanged words which made the appellant angrier and while they were walking towards the mother's body the appellant

¹⁴ (1955) 15 W.A.C.A. 73.

¹⁵ [1965] E.A. 496.

killed the deceased. The trial judge rejected the appellant's plea of provocation to a charge of murder because enough time had elapsed for passion to cool. On appeal, it was held, allowing the plea, that the incidents formed a connected series of events which made the actual killing of the appellant's mother so proximate to him as to have been constructively done in his presence and that, taking into account the degree of provocation, enough time had not elapsed for passion to cool.

Provocation by one person is no excuse for killing another person who does not in fact offer any provocation to the accused. If A provokes B, B cannot retaliate against C who has offered no provocation to him. Where the provocation is given by a group of persons acting in concert the person so provoked may retaliate against a member of such a group and the person against whom the retaliation is taken need not be the person who struck the actual provocative blow because in such a case the provocation consists of not merely the blow struck but also of the attack by the entire group.

§3. Reaction to be proportionate to provocative act

The offence committed by the defendant as a result of the provocation must be proportionate to the unlawful act that elicited the defendant's reaction¹⁶. In *Bedder v. DPP*¹⁷ the accused, who was sexually impotent, tried, unsuccessfully to have intercourse with a prostitute. She jeered at him and kicked him causing him to lose self-control. He stabbed her twice and killed her. He pleaded provocation but the plea was not sustained because the court reasoned that the conduct of the prostitute would not have had an effect on an ordinary person. If this case were to be decided under the Code the defence of provocation would also fail but on the ground that the defendant's reaction was *disproportionate* to the prostitute's unlawful act of kicking (accompanied with jeering).

At one time the judges in England held that fists might be answered with fists, but not with a deadly weapon.¹⁸ But today matters that a court is apt to take into account in considering this question include the nature of the instrument used in reaction to the provocation¹⁹, and the nature of the act resulting from the provocation²⁰. Some provocation may cause a reasonable

¹⁶ The provocative unlawful act must also be of a kind to deprive an ordinary person of self-control.

¹⁷ [1954] 2 All E.R. 801.

¹⁸ *Duffy* [1949] 1 All E.R. 932n.

¹⁹ For example, a Dane gun or a wand or a sheathed machete or a knob stick customarily carried around by tribesmen.

²⁰ An example is the case of inflicting several and severe wounds on the deceased with a machete upon provocation by abusive songs.

person to retaliate with a slap on the face; another may cause a killing. If a woman uses filthy and offensive language to her husband and he then stabs her five times with a heavy dagger, the offence of killing the woman is grossly out of proportion to the unlawful act of using obscene language.²¹ Similarly, if husband and wife are engaged in a struggle and she pushes him down, and he then gets hold of a stick with which he kills her by striking her two blows on the head, the killing is disproportionate to the provocation by pushing down.²²

In deciding the issue of proportionality the court has to consider both the nature of the act resulting from the provocation and the gravity of the provocation offered to the person, i.e. the gravity of the provocative act or conduct of the victim. "If A provokes B and B kills him by hitting him one blow on the head with a stick, the courts may hold that this is manslaughter [i.e. unintentional killing]. But if B had struck the same blow plus several other blows and then hacked A to pieces with a knife the temptation is to hold that this is murder because the mode of resentment was disproportionate to the provocation, whether or not A died of the first blow only and even though the blows and the mutilation were done in the single minute."²³

In *R v. Bassey*²⁴ the appellant was attacked by three persons of whom the deceased, a woman, was one. The appellant inflicted four blows on the deceased and she died. The trial judge found that the sudden attack on the appellant would cause a reasonable person of the appellant's standing in life considerable anger and cause him to strike the deceased once but that it did not excuse his continuing to deal death blows on the deceased then incapacitated, for the second, third and fourth times in quick succession. On appeal, the Supreme Court disagreed with the trial judge and found provocation proved. It pointed out that the finding of the trial judge implied that there was time for the appellant's passion to cool between the infliction of the first blow and other injuries. "We are unable to agree," said the Supreme Court. "All four blows were delivered within a matter of seconds of each other and if the first was, as the learned Judge found, given in the heat of passion caused by sudden provocation we cannot see how the other blows can be treated differently."

§4. Illustration of proportionality

Provocation may warrant killing in certain circumstances. A killing while passions are set aflame is recognised by the law as less morally culpable than

²¹ *R. v. Akpakpan* (1956) 1 F.S.C. 1.

²² *Nomad v. Bornu N.A.* (1954) 21 N.L.R. 31.

²³ Okonkwo & Naish, pp. 248-249.

²⁴ [1963] All N.L.R. 280.

one committed in cold blood. Subsections (2) and (3) of section 85 illustrate the matter of proportionality with two situations. The two situations are those in which the law, in its wisdom, irrebuttably presumes that there is adequate provocation to justify such extreme reaction as the commission of murder. In one situation the law stipulates that murder or wounding is proportionate to provocation by violent blows or injuries. In other words, the murder or wounding of the provoker is proportionate to the violent assault or injury by the provoker.

In the other situation the law also stipulates that the murder or wounding of a spouse or of his/her lover is proportionate to the provocation of the cuckolded spouse finding that spouse and his/her paramour in the act of adultery. In other words, adultery is sufficient provocation warranting the murder or wounding of the adulterous spouse or his/her paramour caught in that act. But it seems that a mere confession of adultery will not be sufficient without more to excuse a cuckolded spouse in murdering the confessor's paramour because such a confession is not an unlawful act.²⁵ However, the court would probably take a different view where the confession amounts to a contemptuous act within the meaning of section 152 of the Penal Code. In one case a wife jeered at her husband who was an illiterate, taunted him with being impotent, and told him that she was having sexual intercourse with other men. This was held to be sufficient provocation.²⁶

In another case a woman who was nursing a seven month old child and was then five months pregnant called her husband a fool when he questioned her as to who was responsible for the pregnancy. It was held that this constituted provocation.²⁷ But a wife's refusal to prepare food for her husband does not constitute provocation²⁸; nor would her refusal to have sexual intercourse with him. In yet another case it was held to be provocation where a woman taunted her husband with incompetence and then spit in his face²⁹; but in another case it was held not to be provocation where a younger brother said to his elder brother during a marriage ceremony that he had provided money for the latter's marriage.

The plea of provocation succeeded in *Usumanu* but failed in *Ndimasa*. In *Usumanu v. The People*³⁰ the appellant, a cowherd, while tending his cows in a field at Mutang-Fundong near Njinikom saw them suddenly scatter and blamed the only other person in the vicinity, Sabi Kumbong who had been

²⁵*Holmes v. DPP* [1946] A.C. 588.

²⁶ *R. v. Adekanmi* (1944) 17 N.L.R. 99.

²⁷ *State v. Ufomba* (1972) E.C.S.L.R. 755.

²⁸ *R. v. Eseno* (1960) 5 F.S.C. 50.

²⁹ *R. v. Igiri* (1948) 12 W.A.C.A. 377.

³⁰ (1968) W.C.L.R. 17.)

cutting bamboo nearby. A quarrel ensued followed by a fight, in the course of which the appellant became possessed of Sabi Kumbong's machete and killed him with it. He was charged with murder under the Criminal Code then in force. At the trial the appellant admitted that he killed the deceased, but pleaded self-defence or, in the alternative, provocation. According to his testimony the deceased attacked him first with his machete. As the deceased raised his machete to cut him with it he raised his left hand to defend himself and sustained serious injury to his left wrist. He then succeeded in wrestling the machete from the deceased and used it to deliver the fatal blow on him. Kesiro J. sitting in the High Court at Bamenda did not believe the appellant and, relying on medical evidence adduced in court, held that the appellant's injury was self-inflicted. On the plea of provocation the learned trial Judge found that there was no provocation to warrant a reduction of the crime from murder to manslaughter. He then found the appellant guilty as charged and sentenced him to death. On appeal to the West Cameroon Court of Appeal it was held (Cotran CJ., Endeley J. and Dervish, Ag. J.), that the learned trial Judge did not approach the question of provocation on a view of the evidence most favourable to the accused and that the appellant did kill Sabi Kumbong upon provocation within the meaning of the law. Their Lordships reasoned as follows:

“In English law, the most authoritative statement on killing upon provocation is that of Devlin J. in the case of *R. v. Duffy* (1949) 1 All E.R. 932. It runs as follows: ‘Provocation is some act or series of acts done by the deceased to the accused which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him for the moment not master of his mind.’ It is pertinent, while dealing with the matter of provocation, to cite the judgment by the Federal Supreme Court of Nigeria in *R. v. James Adekanmi*, 1944, XVII N.L.R. 99 at page 101, where it was held that the question of an accused person's cultural status should be considered in order to determine the issue of provocation. When the evidence shows a provocative act committed against the accused by the deceased, using ‘provocation’ in its non-technical sense that act, although it might not be such as to amount legally to provocation if committed against ‘an educated and civilized person’, should be considered to be legally provocation if committed against ‘an illiterate and primitive peasant’, whose passions ‘are far more readily aroused than those of a civilized and enlightened class’. This decision has much application in the present case. The accused (appellant) is a simple cowherd. In the

sudden encounter he saw the deceased armed with a cutlass while he himself was completely unarmed. We are inclined to the view that his passions were immediately aroused and in the heat of the moment he thought he was engaged in a life and death fight with deceased, and if he does not kill the deceased, the deceased would kill him. There was certainly no time for his passions to cool. ... The settled rule of law is that the onus always remains on the prosecution to prove absence of provocation. If there is any doubt whether the facts show sufficient provocation to reduce the killing to manslaughter, the issue must be determined in favour of the accused.”

The appeal was accordingly allowed and a verdict of manslaughter substituted for that of murder³¹ and the appellant sentenced to 10 years imprisonment.

In *Aliyo Lahpana Ndimasa v. The People* (1968)³² X, the appellant, cohabited with a woman, Y, the deceased, for four years during which time X went to prison for one year. After X’s discharge from prison the relations between him and Y, on the one hand, and between him and the father of Y, on the other hand, went sour. X was annoyed that while he was in prison Y moved her belongings to her father’s home, spent 13.000 francs which he gave her before going to prison, and that since coming out of prison Y’s father always referred to him as a ‘thief’. His anger was enlarged by the insistence of Y’s father that he must pay 21.000 francs dowry for his daughter if he wanted to keep her. One day X saw Y talking with a man who was coming out of Y’s house and who ran away as he approached them. When X questioned Y about the man, a quarrel ensued between them. X picked up a cutlass and dealt a blow on Y’s neck. Blood gushed out and Y died almost immediately. X was seen running away from the *locus criminis* holding a cutlass, and managed to avoid arrest for ten days. When he was eventually arrested he appeared before Kesiro, J sitting at the High Court in Buea, charged with murder. He admitted killing Y, but said in extenuation that the killing was in reaction to being hit by Y on the shoulder with a stick. The learned trial Judge disbelieved him, found him guilty as charged, and sentenced him to death (which was then the prescribed penalty for murder).

His appeal to the West Cameroon Court of Appeal (Cotran, CJ, Endeley and Dervish, JJA) was grounded essentially on the issue of provocation. The

³¹ In the Penal Code capital murder as defined in s. 276 is punishable capitally and when reduced upon a successful of provocation the offence becomes either murder, attracting a life sentence, or assault occasioning death, punishable by imprisonment for from 6 to 20 years.

³² (1968-1970) UYLR 19.

line of argument canvassed on behalf of appellant was in effect that the deceased was caught talking to a man who then escaped on seeing the appellant approaching. That incident (the woman talking to another man), it was argued, amounted to provocation. It was further contended on behalf of the appellant, relying on *Usumanu v. The People*³³, that appellant was also provoked when the deceased hit him with a stick. In their judgment delivered by Cotran, CJ their Lordships held that the plea of provocation must fail. The learned Justices of Appeal did not see any provocation in the instant case, which could reduce the conviction for murder to manslaughter. The appeal was accordingly dismissed and the conviction and sentence of death confirmed.

The case of *Marcelina N. Frederick v. The People* (1970)³⁴, is a typical one of the battered-wife syndrome. The appellant, a housewife, had just been discharged from the hospital where she had undergone an operation. In the night, her husband, Frederick Okpare, demanded to have sexual intercourse with her. She rejected his demand saying having sex would be dangerous for her health as she had just had an operation and the wounds were not yet healed. The husband would not listen and insisted on having sex. He then tried to have sex with her by force. A struggle ensued during which she picked up a hard object and hit him very hard on the head. He collapsed and died. She was arrested and charged with the capital murder of her husband. Endeley, J sitting in the High Court at Buea held that the assault on the deceased was premeditated, deliberate and calculated, and that at all times before, during and after its perpetration, the appellant was in a mental state to well appreciate what she was doing and the obvious consequences of her acts. He convicted her and sentenced her to die by hanging. She appealed to the West Cameroon Court of Appeal (Cotran, CJ, Kesiro and Dervish, JJA).

The appellant gave three different versions of how she killed her husband. In the first version she stated: "When I was already asleep, I felt someone opening my legs and entering between my legs. Then I became awake, and saw that he was the one. Then I pushed him off and asked him what was happening. Then he replied that he wanted to have sexual intercourse with me. ... Then I asked him whether he wanted to kill me as he had said, because he was well aware of the fact that in the situation in which I was it was dangerous for me to do anything like that. Then he continued forcing himself on me. Then I took my two hands and forced him off again. By then he had already introduced his entire penis into my vagina. When he came off he carried me off the bed and knocked me on the floor. I got up and took something and

³³ (1968) WCLR 17

³⁴ (1968-1970) UYLR 96

knocked him with it.”

In the second version she said, “When I was asleep I heard somebody opening my legs to introduce his penis into my vagina. I asked him whether he really wanted to kill me as the doctor had warned me not to take part in sexual intercourse, but he said I could die, that was nothing to him. But I managed to force myself away and fell down and suddenly the lamp, which was standing by our bed, went off. While I was on the ground crying my husband sat on the bed for some time and again slept. After I had cried a lot I became very much annoyed, got an object which I do not know, hit him and started running away.”

In the third version explaining the circumstances of the killing the appellant said, “When I was asleep my husband came near my legs and asked that I allow him have sexual intercourse with me. ... When I told my husband that I could not allow him to have sexual intercourse with me, he decided to force me into having it. I then pushed him away from me. He then gave me another slap. When I tried to get away from the bed he held me and threw me to the ground. I started crying. When I was tired of crying I stopped and fell asleep on the floor of our bedroom. When I woke up from sleep it appeared to me that I was fighting with my husband. Without being quite myself, I turned round seized something I lay my hands on and started hitting him with it. After hitting him I started to run away.”

The appellant thus admitted killing the deceased. However, it was argued on her behalf that the slaying did not amount to capital murder in that there was no premeditation and that it was “committed under provocation of such a nature as to reduce the charge of capital murder to one of manslaughter under s. 278.” The Appeal Court found no merit in the argument relating to provocation.

Their Lordships made this rather gender-insensitive comment:

“In the present case there is no doubt that the appellant was assaulted by the deceased on two occasions that night and also that the deceased attempted to have sexual intercourse with her against her wish. But the assaults were by his bare hands and cannot be considered violent. In fact the appellant herself stated in her evidence that the deceased gave her a single slap. It may have been heavy, for she fell down, but in our opinion it could not have been of such a violent nature as to justify the use of the weapons with which the appellant inflicted the fatal injuries. Nor do we think that the attempted intercourse with the appellant amounted to provocation of such a nature as to justify the use of these weapons. We have no doubt that the appellant must have been very distressed that night

because of the two assaults on her and apparent disregard of her husband for her health and wellbeing, but we do not consider that these constitute sufficient provocation in law to warrant the application of section 85 of the Penal Code.”

The following antecedent facts should have influenced the court to find provocation: the appellant was assaulted twice in the fateful night by the deceased; the appellant had just had major surgery, the wounds of which had not fully healed; the doctor’s medical advice that appellant should refrain from sexual intercourse, which fact she told her husband; the insensitivity of the deceased to appellant’s physical and mental health; the deceased’s unreasonable demands for sex in the light of appellant’s life-threatening medical condition; the mental state of the appellant.

§5. Loss of self-control

Provocation presupposes a loss of self-control through extreme anger. Hence, it must also be shown that the provoker’s unlawful act was of a kind to deprive an ordinary person of self control, that is, the provocation was of such a degree as to cause a reasonable person to lose mastery of self. Provided the provocation is of such a kind, it would seem immaterial that it was not the only cause but a contributory one. In considering the question of the degree of self-control the court is likely to consider background events (e.g. previous assault or hostility) and the cultural background of the community to which the defendant belongs. It is legitimate for the court to do so because certain acts or utterances arouse more passion in members of some communities than in others. Conduct or an act which will constitute provocation if done to a member of a class of one community may not amount to provocation if done to a member of another class. The reason is that the act or conduct, for some reason peculiar to the one class, is provocation to that class but not to the other. However, if the defendant is by nature an unusually excitable or pugnacious person or is more easily excitable by reason of drunkenness or is easily angered, the court will discount these factors in deciding whether he has been provoked or not.³⁵ This was done in *Newell*³⁶. In that case D, a chronic alcoholic, killed P by hitting him 22 times over the head with a glass ash-tray after they had been drinking and P had made disparaging remarks about a girlfriend who had left D after living with him for some time. At the beginning of the killing D was drunk, emotionally upset and depressed by his girlfriend’s action and in a state of toxic confusion as a result of taking a drug overdose in

³⁵ Okonkwo & Naish, pp.242-243.

³⁶ (1980) 71 Cr App Rep 331, CA.

a suicide attempt four days previously. Held by the Court of Appeal that the trial judge was right in discounting these circumstances holding that apart from the chronic alcoholism the other circumstances were too transitory in nature to be characteristics and therefore the reasonable man could not be invested with them.³⁷ The court is also likely to discount the question of the defendant's age or level of education.

If a defendant pleads that he acted under a reasonably mistaken belief that he was being provoked then the court will no doubt judge him as if the facts were as he mistakenly believed them to be.

³⁷ Cited in Card, p. 216.

Principal and Secondary Offenders

When two or more persons take part in the commission of an offence they are in law considered and punished as principal and/or secondary offenders, depending on the degree of participation of each person in committing the offence. The distinction has not always been that clear-cut. For example, English common law used to distinguish between principals in the first degree and principals in the second degree. Principals in the first degree were those who actually committed the crime; whereas principals in the second degree were those who aided and abetted the crime at the time of its commission and were known as aiders and abettors, different from ‘accessories’. Accessories were those who successfully incited the commission of a crime. Today, the former principal in the first degree is regarded as the principal offender, while the former principal in the second degree (aider, abettor or inciter) is considered simply as an accessory. The Penal Code does not use the terminology ‘principal’ and ‘secondary’ offenders. But it makes a conceptual distinction between the two, though this is done implicitly rather than explicitly. The distinction will therefore be used as our frame of analysis.

Section 1. Principal Offenders

A person may commit an offence alone, as commonly happens. In that case he is a single perpetrator of the offence or a sole offender. But where two or more persons in agreement with each other directly commit an offence they become common or joint perpetrators, that is to say, co-offenders. Co-offenders are also principal offenders because all of them, like the sole offender, knowingly (i.e. agree to) participate in the commission of the offence, more often by committing each of the ingredient acts or omission of the offence with the necessary mental element (if required). In the co-offenders situation, the mental element is the agreement to commit the offence; the physical element is the participation in committing the crime.

§1. Sole principal offender

A person who alone commits an offence is a sole offender. More often than not he would do the deed by his own hand. But at times he may procure an innocent agent to do it. An innocent agent can be described as someone without criminal intention (or other requisite mental element), or who is not

guilty because of an absolute defence such as infancy, lawful defence, total insanity, and so on. An example often given of an innocent agent acting without criminal intent is the case of a postman who unknowingly delivers a letter bomb. In *Bourne*¹, a man forced his wife on two occasions to commit buggery with a dog. He was convicted of aiding and abetting the offence. It made no difference that his wife who committed the buggery could not be convicted (had she been prosecuted), because of his duress.

A person may train a monkey to steal. He may induce a child to injure another. He may prompt a lunatic to kill. In each of these cases he remains the perpetrator of theft or assault or murder, as the case may be, because there is no guilty act in the direct actor (the innocent agent) to which he can be called accessory or secondary offender. If a physician provides a poisonous drug and tells a nurse that it is medicine to be administered to her patient and she administers the drug and the patient dies, the physician and not the nurse (an innocent agent) is the perpetrator of the offence.² In *Cogan and Leak*³, Leak terrorised his wife into having sexual intercourse with Cogan. Both were convicted of rape. Cogan's conviction was quashed by the Court of Appeal because the trial court had not left to the jury Cogan's defence that he believed Leak's wife was consenting to the intercourse. Leak's conviction was upheld on the basis that he had procured the crime to happen. The Court of Appeal said, *obiter*, that Leak could alternatively have committed the offence as principal through the doctrine of innocent agency. "Had Leak been indicted as a principal offender," Lawton LJ opined, "the case against him would have been clear beyond argument." In *The People v Godguide Nganyu & William Talla* (1984)⁴, the first defendant took the second defendant, an infant, to a store and got him to climb into it and to steal 20,000 francs. It was held by the Nkambe High Court that the second defendant was simply an innocent agent and that the first defendant was guilty of aggravated theft as sole offender.

It is not in every case that it is easy to identify a principal offender or an accessory. Sometimes it is clear that an offence has been committed and yet it may be difficult to identify who the principal offender is or whether there was

¹ (1952) 36 Cr App R 125.

² *Anon* (1634), Kel 53; *Michael* (1840) 9 C & P 356. In *Michael* D's child, P, was in the case of a nurse, X. D, intending to murder the child, delivered to X a large quantity of laudanum, telling her it was a medicine to be administered to P. X did not think the child needed any medicine and left it untouched on the mantelpiece of her room. In X's absence, one of her children, Y, aged five, took the laudanum and administered a large dose to P who died. Held, that this administration by "an unconscious agent" was murder. It seems the result would have been different had Y attained the age of criminal responsibility.

³ [1976] QB 217, [1975] 2 All ER 1059 CA.

⁴ Suit No. HCN/18/84, unreported.

an accessory. In *Lane and Lane*⁵, the evidence showed that the child of Mr and Mrs Lane was killed between 12 noon and 8.30 pm. Each parent had been present for some of this time and absent for some of this time. It could not be proved that one was the principal and it could also not be proved that the other must have been an accessory. Both were accordingly acquitted of manslaughter. In this country each parent would most probably be convicted of unintentional killing under section 289 (1) of the Penal Code, as a principal offender, on the sufficient ground that each of them had been careless in being absent at some point during the time interval from 12 noon to 8.30 pm. In *Ikram and Parveen*⁶, a father's one-year-old son suffered a non-accidental broken leg. This caused fat to enter the blood stream blocking the blood vessel⁷ and leading to the child's death. No one else except the boy's father and his partner (i.e., his mistress) had had any contact with the child on the fateful day. Clearly, one or other of the defendants must have been responsible for the child's broken leg. But both defendants claimed not to know how the child's leg was broken. With no other evidence it would have been extremely difficult to convict either defendant of murder or manslaughter. They were both convicted under the English Domestic Violence, Crime & Victims Act 2004 for causing or allowing the death of a child.

The courts are unlikely to follow this course where it can be proved that one or two or more parties to a crime must have been guilty either as principal or as accessory. In *Giannetto*⁸, a man was convicted of the murder of his wife. The prosecution's case was that the wife was murdered either by her husband or by a hired killer on his behalf. The husband appealed on the ground that, if the prosecution could not prove whether he had murdered his wife himself or someone else had done it, he was entitled to an acquittal. The Court of Appeal had no difficulty dismissing the appeal. If the husband had the requisite mental element, then it did not matter whether he had killed her by his own hand or encouraged another to do so.

§2. Joint principal offenders (co-offenders)

Where two or more persons agree to take part and actually take part in the commission of an offence they are described as co-offenders or joint perpetrators. The Code defines a co-offender as a person who, in agreement

⁵ (1986) 82 Cr App R 5.

⁶ [2008] 4 All ER 253.

⁷ Pathologists call this condition 'fat embolism', by which they mean the blocking of a blood vessel by fat clot.

⁸ [1997] 1 Cr App R 1.

with another, takes part with him in the commission of an offence.⁹ The requirement of prior agreement between the joint perpetrators means that there can be no co-offenders in a purely unintentional offence. Two or more persons cannot be charged as co-offenders for committing an act recklessly or negligently or rashly or carelessly.

In criminal law, two or more persons become co-offenders when they *agree* to commit an offence and actually *participate* in committing the said offence, their respective contributions in execution of that common agreement being immaterial. Both have the requisite mental element and both participate in the commission of the offence. So long as both agree to commit an offence and actually participate in doing so, the part played by each in the resultant offence is immaterial. A and B agree to assault C. A holds C's hands while B delivers the blows. Both A and B are guilty of the offence. It will be an idle contention on the part of A to say he is not guilty of assaulting C because he did not deliver any blows. But where the offence is one which can only be committed personally, the party who, despite his active association in the commission, did not personally do the act, cannot be guilty as a co-offender but only as an accomplice. Supposing that X and Y agree to rape Z. X pins down Z while Y has carnal knowledge of Z. Only Y will be guilty of rape, while X will be guilty as accessory to rape.

Whether the agreement was reached sometimes much earlier or just before the commission of the offence is also immaterial. Equally immaterial is the level of participation of each co-offender in the commission of the offence. Supposing A and B agree to kill C by shooting him. B fires at C's foot and A at C's heart. Both of them remain criminally responsible for the murder and to the same extent. This includes responsibility for any other offence, desired or not, committed as a foreseeable consequence of the agreement to commit the primary offence. Supposing A and B agree to 'take down' someone they suspect to be a thief. Each has a firearm of a different make. They shoot, one after the other, at the fleeing suspected thief, who then drops dead. If the autopsy shows that the deceased had been hit by only one bullet, the one fired from A's gun, the question might arise whether B is also criminally liable for the killing. The answer is yes. B agreed with A to kill the suspect and took part in shooting at him. The bullet from B's gun may not have been the one that fatally wounded the suspect. But B had agreed with A to kill the suspect and had actually fired at him intending to kill and foreseeing death as a consequence of the joint agreement reached with A. Section 99 (1) teaches that any co-offender to the commission or attempted commission of a felony

⁹ Section 96. Co-offenders act in furtherance of a 'common purpose' or a 'joint enterprise'.

or misdemeanour is also responsible in respect of any other offence committed or attempted as a foreseeable consequence of the agreement. So, where two or more persons agree to commit an offence and act together to commit it, the law regards every act performed by each of them in pursuance of that agreement as an act by all of them, and they are therefore equally liable for that offence. All of them are equal partners in the commission of the offence. They are *socii criminis* or partners in crime. As a matter of criminal law policy, the conduct of each perpetrator is imputed to all the others.

Take another hypothetical case. Two burglars agree and participate in breaking in and stealing from a bank. One of them is armed to the knowledge of the other and both contemplate the use of the firearm, if need be. The one with the gun uses it to kill a security guard on duty at the bank. The killing perpetrated with the firearm is a foreseeable consequence of the agreement to burgle the bank. Both burglars, and not only the one who pulled the trigger, would additionally be convicted of murder. But if the one who is armed sees his personal enemy walking across the street and shoots and kills him as they drive off from the bank in a get-away car, he alone would additionally be convicted of murder because the killing of the enemy was unconnected with the burglary at the bank and thus not a foreseeable consequence of the agreement to rob the bank.

Common criminal purpose. The Code concept of participation in crime as co-offenders is analogous to, or the equivalent of, the English law doctrine of common purpose exemplified in the early case of *R v Swindall and Osborne*¹⁰. The common purpose doctrine teaches that where two or more people associate together in order to commit a crime, each of them will be liable for the criminal conduct of the other that falls within the scope of the common purpose.¹¹ All of them who so associate together are regarded as co-offenders, or co-perpetrators as they are also known. Their *actus reus* in such a case consists of their act of associating together with a common purpose to commit the crime, which is ultimately committed by one or all of them. The common purpose rule has practical utility. It relieves the prosecuting authority of the trouble of having to prove all the physical ingredients of the offence on the part of each of the participants. Thus, in result crimes such as murder, for example, it becomes unnecessary for the prosecutor to prove that each

¹⁰ (1846) 2 Carr & Kir 230. In that case S and O, cart drivers, challenged each other to a cart race on a public road. During the race, one of them ran over an elderly man and killed him. It was not known which of them had actually caused the death. Held, that since both S and O were driving furiously and urging each other on in the race, it was immaterial which of them had actually run over the deceased and that both were equally liable for his death.

¹¹ Kemp et al., p. 234.

participant contributed towards causing the prohibited consequence, or even to identify the participant who actually caused the consequence. In terms of the common purpose rule, all the prosecutor needs to prove is that the prohibited consequence was caused by one or other of the participants and that the rest shared a common purpose with him to commit the crime. The common purpose rule only applies to crimes that can only be committed personally, such as rape, perjury, bigamy; or to crimes that relate to acts that require a personal permit or licence such as a driving offence; or to crimes which can be performed only by a person of a particular status.

Joint criminal enterprise. International criminal law has developed the concept of ‘joint criminal enterprise’ which has proved handy¹² in dealing with grave crimes, such as genocide, torture, terrorism and crimes against humanity. These crimes are by nature seldom committed by a single individual acting on his own. They are almost always an expression of collective criminality. They are crimes committed by individuals acting in concert with others and as part of a common plan or plot. The application of the joint criminal enterprise doctrine, whatever reservations one might have about it, facilitates the prosecution of mass atrocities, ensuring “accountability for the full gravity of crimes, where the exact role that each participant in a common purpose may be obscured by the massive scale and complexity of the crime.”¹³ The doctrine is therefore more crucial in international than in municipal criminal law.¹⁴ The jurisprudence of international criminal tribunals holds all perpetrators in a joint criminal enterprise guilty, irrespective of the part played by each in the commission of the offence. In *Prosecutor v Mitar Vasiljevic*, the International Criminal Tribunal for the Former Yugoslavia adumbrated the rule that “all of the participants in a joint criminal enterprise are equally guilty of the committed crime regardless of the part played by each in its commission.”¹⁵

¹² Van Sliedregt E, ‘Joint criminal enterprise as a pathway for convicting individuals for genocide,’ (2007) 5 *Journal of International Criminal Justice* 184; Haan V, ‘The development of the concept of joint criminal enterprise at the International Criminal Tribunal for the Former Yugoslavia,’ (2005) 5 *International Criminal Law Review* 167.

¹³ Cassese A, Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise, Case File No. 001/18/07-2007-ECCC/OCJ (PTC 2), 27 Oct 2008 <http://antoniocassese.com/italiano/reports>

¹⁴ Cassese A, ‘The proper limits of individual responsibility under the doctrine of joint criminal enterprise,’ (2007) 5 *Journal of International Criminal Justice* 109.

¹⁵ (2002), Trial Judgment, IT-98-32-T (29 November 2002) at para 67; *Prosecutor v Duska Tadic* (1999), Appeal Judgment, IT-94-1-A (15 July 1999).

The doctrine commonly applies where two or more persons agree to commit a crime and execute it, with corresponding intent according to their common design. This is similar to the concept of co-offenders under the Penal Code. Further, and also similar to the concept of co-offenders under the Code, the doctrine of joint criminal enterprise holds responsible the participant in such an enterprise even for excesses that go beyond the original common plan or agreement, provided that the consequences of the act were natural and foreseeable, and the participants willingly took the risk of their occurrence. Under the Rome Statute, however, liability as a participant in a joint criminal enterprise arises in much more narrower circumstances. ‘Mere participation’ or ‘any contribution’ or ‘active association’ in the commission of the crime would not do. It must be shown that the participant’s act was an ‘essential contribution’ to the crime. A contribution is essential if the other perpetrators cannot execute the common plan without it.

Excesses beyond original plan. Joint enterprise typically involves two or more parties together taking part in a crime. They act jointly as part of a team.¹⁶ Cases often arise in this area of the law, internationally and domestically, as to the criminal liability of one of the parties in the joint criminal enterprise for another crime committed by the other party in the course of the joint criminal enterprise. The test of liability in the criminal law of this country, stated in section 99(1) of the Penal Code, is foreseeability of consequence of the agreement to undertake the joint criminal enterprise. Supposing A and B set out to break into a house and steal from it. They take the occupant of the house by surprise and B produces a knife and stabs him to death. Whether A, like B, is liable for both aggravated theft and murder or just for aggravated theft will depend on whether he foresaw that murder might be committed as a consequence of participation in the joint house-breaking enterprise.

The test under the Code for liability under such circumstances is not whether A knew that B had a knife and foresaw that it may be used. The test under section 99(1) is not knowledge or awareness that another offence would indeed be committed. The test is whether the other offence would be committed “as a foreseeable consequence of the agreement” to participate in the commission of the ‘main’ offence. Only where the other offence was not a foreseeable consequence of the joint enterprise would liability be avoided.

¹⁶ In *The People v Nanji Jacob, Sakwe Isaac & Mesongo* (1984), Charge No. HCK/10c/84, unreported, the Kumba High Court convicted the first and second defendants of aggravated theft as co-offenders. They broke into a cooperative store by making a hole through the wall of the store and stole bags of cocoa from it.

Section 99(1) of the Code finds justification in experience which shows that joint criminal enterprises only too readily escalate into the commission of greater offences. Those who agree to participate in the commission of an offence know or must be taken to know this only too well.

It is submitted that the other offence would not be a foreseeable consequence of the joint enterprise if it is something fundamentally or radically different from what was contemplated in advance. In *Rafferty*¹⁷, three men jointly attacked B on a beach. While the attack was going on one of the men left the scene with B's debit card and tried unsuccessfully to withdraw cash from his bank account. While he was absent, B was dragged across the beach by the others, stripped naked, taken some distance into the sea and drowned. All three defendants were convicted of murder but, on appeal, the conviction of the man who had left the scene was quashed. He had participated in a joint enterprise involving the crime of assault and robbery. The deliberate drowning of B was of a fundamentally different nature to those crimes and therefore the man was not liable for it.

There is a strong line of English authorities to the effect that "where two parties embark on a joint enterprise to commit a crime and one party foresees that in the course of the enterprise the other party may commit, with the requisite *mens rea*, an act constituting another crime, the former is liable for the crime if committed by the latter in the course of the enterprise."¹⁸ In *English* [1997] two men took part in a joint enterprise to attack a police officer with wooden posts. In the course of the attack one of the men produced a knife with which he killed the police officer. The other man did not know that his associate in crime (*socius criminis*) was armed with a knife. His conviction for murder by the trial court was upheld by the Court of Appeal but was quashed by the House of Lords on the matter of evidence that the jury did not receive

¹⁷ [2007] EWCA Crim 1846.

¹⁸ Per Lord Hutton in *English* [1997] 4 All ER 545. In *Chang Wing-Siu and Ors* [1985] 1 AC 168, a man participated in a robbery during which one of his accomplices stabbed the householder to death. His conviction for murder was upheld by the Privy Council. In *Hyde, Sussex and Collins* [1991] 1 QB 134, three people kicked a man into unconsciousness in a pub car park. One of the kicks was to the forehead and was fatal. They denied joint enterprise. Their convictions for murder were upheld by the Court of Appeal. In *Hui Chi-Ming* [1992] 1 AC 34, six men attacked another man who had upset the girlfriend of one of the six. The man was struck over the head with a metal pipe and died. Their convictions for the murder were upheld by the Privy Council. In *Perman* [1996] 1 Cr App R 24, two men were engaged in a joint venture to rob a newsagent's shop. One of them who carried a loaded sawn-off shotgun shot a friend of the newsagent. The other man challenged his conviction relating to the manslaughter arguing that he did not know that the gun carried by the other man was loaded and that he thought it would be used only to frighten. The Court of Appeal quashed the manslaughter conviction because the jury had not been directed to consider the exact nature of the appellant's contemplation of what his joint enterprise partner might do.

direction from the judge on the point of the difference in the weapon that was used in the killing. Lord Hutton however argued that:

“If the weapon used by the primary party is different to, but as dangerous as, the weapon which the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the difference in the weapon, for example, if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill, or vice versa ... There will be cases giving rise to a fine distinction as to whether or not the unforeseen use of a particular weapon or the manner in which a particular weapon is used will take the killing outside the scope of the joint venture, but this issue will be one of fact for the common sense of the jury to decide.”

Based on the provisions of section 99(1) of the Penal Code, the courts here would decide *English* as did the trial court and the Court of Appeal. In terms of section 99(1), so long as the offence committed was a foreseeable consequence of the joint enterprise, both parties are criminally liable for it. In *English* both parties participated in the joint enterprise knowing that serious injury might be caused with the wooden posts and therefore that there was a substantial risk of killing. Killing was therefore a foreseeable consequence of the agreement to attack the police office. Killing took place and the fact that it was by a different weapon will not take the killing outside the scope of the joint enterprise.

In *Rahman & Others*¹⁹, four men attacked Clarke, a 16-year-old boy, using a variety of blunt objects, including baseball bats and metal bars. However, Clarke was killed by two deep knife wounds to the back, probably inflicted by someone else who escaped and was never apprehended. The four men denied knowledge of the knife but were convicted of murder. They appealed, without success, to the Court of Appeal, and again, to the House of Lords. The House ruled that for a man to face liability for murder in a joint enterprise case where the deceased had been killed by one of the others in the joint enterprise, the man need not have foreseen that the other who did the killing did so with intent to kill. Lord Bingham said, “It is safer to focus on the defendant’s foresight of what an associate might do, an issue to which knowledge of the associate’s possession of an obviously lethal weapon such as a gun or a knife would usually be very relevant.”

¹⁹ [2009] 1 AC 129.

Section 2. Secondary Offenders: accessories

Section 97 of the Penal Code provides:

“(1) An accessory shall mean a person who abets the commission of a felony or misdemeanour, that is:

(a) Who orders or in any manner causes the commission of an act or omission so defined; or

(b) Who aids or facilitates the preparation of the commission of such an offence.

(2) Attempted abetment shall be treated as abetment.”

§1. Meaning of accessory

An accessory (also known as an accomplice) is a person who abets²⁰ the commission of a non-summary offence²¹. The commission of an offence may be abetted in any of the following ways: by *ordering* the commission of an act or omission defined as an offence, by *causing* in any manner the commission of an act or omission defined as an offence, by *aiding* the preparation of the said offence, or by *facilitating* the preparation of the commission of the said offence. Generally, abetment means encouragement or instigation, and an accessory is one who instigates or helps or incites or counsels or procures the commission of a felony or misdemeanour. These various forms of abetment are subsumed in the phrase “in any manner causes” the commission of an offence.

Depending on the form it takes, conduct amounting to accessoryship or complicity may take place prior to, at the time of or after actual commission of an offence. Typical examples are supplying information or equipment, keeping watch, or acting as driver. Instigating, inciting, ordering or causing the commission of an offence would usually take place before the actual commission of the offence instigated. So also counselling, advising or suggesting or encouraging the principal prior to the commission of an offence, such as hiring a ‘hit man’ to ‘take out’ someone. Helping or assisting the commission of an offence would more often be at the time of the offence, though help may also be given before the actual commission of the offence. If a crowd of onlookers are cheering a person’s assault or rape of another that would be abetting or assisting by encouragement of the commission of the offence. To provide a meeting or hiding place for criminals or to shelter an offender after he has committed an offence or to receive stolen goods, are some examples of accessory after commission of the offence because they

²⁰ Section 97 (1).

²¹ Section 21 (1)(c). A summary offence is termed in the Code as a simple offence. A non-summary offence is any other offence, whether classified as a misdemeanour or a felony.

constitute a form of assistance, encouragement and comfort to the offenders. Accessoryship is generally not a ‘stand-alone’ but a ‘conditioned’ offence. The charge sheet would state that the person on trial is accessory to some principal offence and not simply that he is an accessory.

However, there are instances in the Code where abetment is punished as an autonomous offence. It is an offence under section 183(2) for anyone to *instigate* the public to refuse the payment of any tax. An appeal to the public not to pay tax amounts to instigation whether or not the appeal is heeded. And it matters not how the appeal is made, whether by way of political activism, through the media, through handbills, or through speeches; provided always that the appeal is addressed to the public rather than to a specific target group (say, unionised workers in a particular industry). It is also an offence under the same subsection for anyone to *instigate* the public to delay the payment of any tax. Payment is delayed when it is made after the expiry of the period during which it is due or after the extension period for payment, if any. Other instances of abetment punished as an autonomous offence include: habitually furnishing places of refuge or assembly to malefactors²²; accessory after the fact by shelter²³; instigating a foreign power to undertake hostilities against the state²⁴; instigating or encouraging the gathering of insurgents during an insurrection²⁵; failure by a public servant to prevent the use of force against or the deprivation of liberty or obstruction of the exercise of civic rights by another²⁶; delivery of arm or ammunition to a person without ascertaining that he is licensed to keep it²⁷; aiding or facilitating another person’s prostitution²⁸; and receiving²⁹.

§2. Accessory before the fact

Abetment often takes place before the fact. This is the sense in which that term is commonly understood and for that reason some writers consider it a ‘preliminary offence’ along with attempt and conspiracy. If a person orders or in any manner causes the commission of an offence he is an accessory before the fact.³⁰ In *Luffman*³¹, D asked E to murder her ex-husband and agreed to pay him £30,000 to do it. She then pestered him to carry out the killing as

²² Section 99 (2).

²³ Section 194.

²⁴ Section 103 (a).

²⁵ Section 116 (a).

²⁶ Section 146.

²⁷ Section 237 (3).

²⁸ Section 294 (1).

²⁹ Section 324.

³⁰ Section 97 (1)(a).

³¹ [2008] EWCA Crim 1739.

quickly as possible, until he eventually did so. D was convicted of counselling murder. In *Calhaem*³² a woman wanted another woman killed and hired a hit man for £5,000 to do the job. The hit man later changed his mind about the killing but went to the prospective victim's house armed with a hammer, knife and a loaded shotgun with the intention of pretending to kill the woman so that he would not forfeit the £5000 down-payment that was made to him. When the woman opened the door the hit man went berserk. He hit the woman several times with the hammer and stabbed her in the neck. She died. The hit man pleaded guilty to murder and the woman who had hired him to do the killing was convicted of counselling the murder of the deceased. The conviction was upheld on appeal. The question in *Gillick v West Norfolk and Wisbech AHA*³³ was whether it would be unlawful for a doctor to give contraceptive advice to a girl under 16 because that would be tantamount to aiding and abetting the girl's boyfriend to commit the offence of unlawful sexual intercourse with a girl under 16. In the view of the House of Lords the doctor would not be acting illegally, provided that what he did was necessary for the physical, mental and emotional health of the girl. In the words of Lord Scarman, "the bona fide exercise by a doctor of his clinical judgment must be a complete negation of the guilty mind which is an essential ingredient of the criminal offence of aiding, abetting the commission of unlawful sexual intercourse."

In *Marchant and Muntz*³⁴, a farmer instructed his employee to take an agricultural vehicle onto a public road. A motorcyclist collided with the vehicle and was killed. It was alleged that simply driving the vehicle itself on a public road was dangerous. The farmer was convicted of procuring the offence of causing death by dangerous driving. The conviction was quashed on appeal. The vehicle was authorised for use on a public road and the farmer had not caused the death of the motorcyclist simply by sending the employee out onto the public road in the vehicle, which was properly maintained. In another case, *Attorney-General's Reference (No 1 of 1975)*³⁵, the defendant surreptitiously plied a man's drink with alcohol, apparently for a joke. When the man was driving home he was arrested and charged with driving under the influence of alcohol. Since defendant's addition of alcohol to the man's drink was the direct cause of the offence, defendant was charged with and convicted of procuring the offence.

³² [1985] 1 QB 808.

³³ [1986] AC 112.

³⁴ [2004] 1 WLR 442.

³⁵ [1975] QB 773.

A person is guilty under section 97 (1)(a) only upon proof that he intentionally ordered or caused the actual commission of the offence in question. The person would of course not be present at the time of actual commission of the offence. But he would have actively procured, counselled, ordered, incited, encouraged or instigated the commission of the offence. In *R. v. Bullock*³⁶, B hired a motor car on two occasions to carry out a burglary. He supplied the car to burglars. He was convicted as accessory and he appealed. Devlin J dismissed the appeal, holding that the appellant knew he was encouraging the burglary. It is otherwise where a person's conduct does not amount to encouragement. In *R. v. Taylor*³⁷, X agreed to be a stakeholder in a prize-fight between Y and Z but neither encouraged nor was present at the fight. Y died during the fight. Held, that X was not guilty of accessory to manslaughter.

While it must be shown that the abettor knew of the kind of offence that will be committed, it need not be shown that he knew the precise details of the particular offence. It is sufficient to show that he knew facts sufficient to indicate the particular offence intended and which is later committed. In *R. v. Bainbridge*³⁸, D supplied thieves with oxygen cutting equipment purchased by him six weeks earlier. The equipment was used for breaking into a bank. Held, that D was an accomplice to this offence because he knew, when supplying the equipment that it was to be used for a 'breaking' offence. He need not have known the identity of the bank or other place that was to be broken into or when the breaking-in was to take place. But D would not have been guilty if he merely knew that the equipment was to be used for some criminal purpose.

If a man who is helping another commit an offence knows or is aware that a limited range of offences might also be committed by the perpetrator, and one of them is actually committed by him, then the man can be convicted as a party to it. But if the perpetrator commits an offence which differs only in its mode of commission from the felony or misdemeanour instigated, the instigator is not excused from liability; but if the offence committed is, in fact, a different crime to that instigated, the instigator has a credible defence. In *R. v. Saunders & Archer*³⁹, Saunders desired to kill his wife in order that he might marry another woman. He consulted Archer, who advised him to put a certain poison in an apple and give his wife. Saunders did so in the absence of Archer. The wife took a bite of the apple and then handed it to their girl child. She ate it and died. Held, that Saunders was guilty of murder because he gave the

³⁶ [1955] 1 All E.R. 15.

³⁷ (1875) 2 C.C.R. 147.

³⁸ [1959] 3 All E.R. 200.

³⁹ (1573) 2 Plowden 473.

poison with intent to kill a person. It was further held that Archer was not guilty as accessory to the murder of the child. The aid and advice which he gave to Saunders related only to kill his wife and no other person. Archer did not advise Saunders to kill the child. The poisoning of the daughter was a distinct thing from that to which he was privy. Where A instigates B to hit C and B hits D, A is clearly not guilty as accessory to the assault on D. If *Saunders & Archer* came before a court in this country the decision would probably be the same since it is doubtful that it was a foreseeable consequence of Archer's advice to Saunders that the poisoned apple would be given to the child leading to her death.

§3. Accessory at the time of the fact

An accessory at the time of the fact is one who actively aids, encourages or facilitates the felon or misdemeanant at the time of the offence. It must be shown that the defendant intentionally aided or facilitated the preparation or commission of the offence in question. The aid or assistance or encouragement may take a variety of forms such as sitting beside the driver of a motor vehicle and encouraging his dangerous driving⁴⁰, cheering and clapping an unlawful assault of a person, cheering and clapping an unlawful theatrical performance⁴¹, pinning a woman down while she is raped⁴², keeping watch or being on the look-out on behalf of thieves while they rob a house⁴³ etc.

But a person is not guilty, for instance, of abetment merely because he is present at the scene where a crime is being committed and does not prevent it. Thus, to continue to sit by the driver of a car until the end of the journey after learning that he is uninsured does not amount to abetting his uninsured driving. In *Coney and Others*⁴⁴, it was held that proof of mere voluntary presence at an illegal bare-knuckle prize fight (a fight with bare fists until one participant is unable to continue) without more is at the most only *prima facie* and not conclusive evidence of abetting the battery which resulted. In *Clarkson and Others* [1971] there was no evidence of intention to encourage. The appellants were soldiers at a British Army barracks in Germany who had witnessed the gang-rape by at least three soldiers of an 18-year-old girl. Other soldiers had aided and abetted the rape by holding the girl down, but there was no evidence that two of the appellants did anything other than just watch. But in *Wilcox v.*

⁴⁰ *Du Cros v. Lambourne* [1907] 1 KB 40.

⁴¹ *Wilcox v. Jeffery* [1951] 1 All E.R. 464.

⁴² *Clarkson* [1971] 3 All E.R. 344.

⁴³ *Betts and Ridley* (1930) 22 Cr App Rep 148.

⁴⁴ (1882) 8 QBD 534.

Jeffrey, it was held that D's presence at a public performance by H, a celebrated alien performer on the saxophone who had been given permission to land only on condition that he would take no employment, was sufficient aiding and abetting on D's part and his behaviour before and after the performance supplied further evidence of his intention to encourage H. It was also proved that he had met H at the airport and he afterwards reported the performance in laudatory terms in the periodical of which he was the editor.

It would seem therefore that where the evidence establishes mere presence without any positive act or prior agreement that the crime is to be committed that will not amount to abetting. For there to be abetting the presence must be combined with some actions such as shouting, gesticulating, or any involvement from mere encouragement upwards. Encouragement could be as little as patting on the back, nodding, saying, "Go on", or "Deal with him", or "Teach him a lesson". In *Coney*, Hawkins J said:

"A man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence ... or he may encourage intentionally by expressions, gestures or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime ... But the fact that a person was voluntarily and purposely present witnessing the commission of a crime and offered no opposition to it ... or at least to express his dissent might under some circumstances afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted."

In *Allan*⁴⁵, D was present at an affray. He was totally passive, though he had a secret intention to join in to help his 'side' if need be. His conviction for abetting a public order offence was quashed by the Court of Appeal. His presence was not an unwitting encouragement since he nursed the secret intention of joining the affray in support of his side if need be. But this secret intention remained in his mind and to convict him would have been tantamount to convicting him for his thoughts alone.

In law, except where there is a legal duty to act, mere abstention from preventing an offence is generally not a crime. An omission to act gives rise to criminal liability only where a person is under a duty to do the thing in question. In the law of abetment, a person may abet a crime through his inactive participation, that is, where his abstention amounts to an act of

⁴⁵ [1965] 1 QB 130.

assistance or encouragement. Abetment by omission often arises where the person has a right to control the actions of another and he deliberately refrains from exercising it to prevent the commission of an offence. His inactivity is taken as a positive encouragement to the other. In *Tuck v. Robson*⁴⁶ customers at a public drinking place continued to consume liquor after closing time. The publican deliberately made no effort to get them to leave the premises. It was held that he was guilty of aiding and abetting the customers' consumption of liquor out of hours because of his failure to exercise his right of control.

Similarly, in *Gibson and Gibson*⁴⁷ a husband stood by and watched his wife drown their children. He was held guilty of abetting the homicide. His deliberate abstention from action was considered as giving encouragement and authority to his wife's act. His conduct amounted to participation by inactivity. The rationale for this decision is that a parent (the husband in this case) is under a duty to take reasonable steps to intervene, whereas generally there is no such duty on a stranger. In *Rubie v Faulkner*⁴⁸, the defendants were owners of cars who had allowed their cars to be driven carelessly, while they sat in the passenger seat. Both defendants were convicted of abetting road traffic offences. Presence in the car, combined with the right to tell the driver what to do, was sufficient for liability.

It is now settled that a man who knowingly gives assistance in the commission of a crime is guilty even though he would much prefer that the crime be not committed. Thus, in *Cafferata v. Wilson*⁴⁹, D, a wholesaler, sold a firearm to E, who kept a general shop but was not registered as a firearms dealer. Seemingly, D knew that E was going to re-sell the firearm which he in fact did. D was held liable as an accessory. It was enough that D intentionally supplied the firearm to E. It was no defence that D was utterly indifferent as to whether E re-sold the gun or not. In *National Coal Board v Gamble*⁵⁰, Devlin J said:

“An indifference to the result of the crime does not of itself negative abetting. If one man deliberately sells to another man a gun to be used for murdering a third, he may be indifferent about whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abetter. To hold otherwise would be to

⁴⁶ [1970] 1 All E R 1171.

⁴⁷ (1984) 80 Cr App Rep 24.

⁴⁸ [1940] 1 KB 571.

⁴⁹ [1936] 3 All ER 149.

⁵⁰ [1959] 1 QB 11.

negative the rule that *mens rea* is a matter of intent only and does not depend on desire or motive.”

The accessory must have knowledge of the circumstances that constitute the crime. In *Webster*⁵¹, D was convicted of abetting his friend, E, in causing death by dangerous driving. E, who had been drinking all day, drove D’s car erratically and at a high speed before losing control, leaving the road and crashing in a field. V, a rear-seat passenger, was thrown out of the car and killed. E pleaded guilty of the substantive offence and D, who had pleaded not guilty, was convicted of abetting him by allowing him to drive his car, when E was obviously drunk. The Court of Appeal held that the crucial issue was whether D had an opportunity to intervene once he realised (because of the speed at which he was going) that E was driving dangerously. It allowed D’s appeal because of misdirection to the jury concerning *mens rea*. The judge had invited the jury to consider whether D knew or ought to have realised that E was drunk.

But a difficult question which arises is the extent to which D must know the details of the crime, which he is alleged to have abetted. It seems clear that if he knows the type of crime which is contemplated, that would be enough. For example, if X were to tell D that he wanted to borrow his revolver to shoot someone, it would not be necessary to prove that D knew who was to be shot or where and when the shooting was to take place. There can be no case of unintentional accessory, but a person who facilitates an offence of which he is ignorant is not guilty by reason of section 74. But a man who prompts a child to steal is an accessory to theft despite the child’s irresponsibility. So, before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence.⁵²

§4. Accessory after the fact

There are two types of accessoryship after the fact, one in relation to criminals and the other in relation to things obtained from the commission of a crime. The former type is accessory after the fact by shelter and the latter type is accessory after the fact by custody or disposal of the fruits of a crime.

⁵¹ [2006] EWCA Crim 415.

⁵² Per Lord Goddard CJ in *Youden and Others* [1950] 1 KB 544.

Accessory by custody or disposal of the fruits of crime. Accessory after the fact by custody or disposal of the fruits of a crime consists in handling the fruits of a crime by keeping or disposing of them. The law provides that a person is an accessory after the fact if he takes custody of, or disposes of anything taken or misappropriated or otherwise obtained by means of commission of a felony or misdemeanour.⁵³ A person is also an accessory after the fact if he holds or disposes of anything procured by the commission of a misdemeanour or felony, whether knowing or having reason to suspect the criminal origin of the property⁵⁴.

Accessory by shelter. Accessory after the fact by shelter consists in giving cover to criminals by providing them a hide-out or by shielding them from the arms of the criminal law. Where a person habitually furnishes places of refuge or assembly to malefactors of whose felonious activities he is aware he becomes an accessory after the fact by shelter and is punishable as such.⁵⁵ He is liable to conviction as an accessory whether the misdemeanant or felon is convicted or not.⁵⁶ A person also becomes an accomplice where he shelters a felon or a misdemeanant or the accessories of a felon or a misdemeanant *from arrest or from investigation*.⁵⁷

Accessory after the fact by shelter is an obstruction *par excellence* of the course of justice. Section 194 (1) punishes the conduct by imprisonment for from 2 months to 2 years. Where the principal offender is punishable by death the accessory is liable to imprisonment for from 2 to 10 years.⁵⁸ The offence is consummated whether the person sheltered has been convicted or not. If a man shelters another from arrest, investigation, or lawful custody he can properly be convicted of accessory after the fact by shelter. If the person sheltered is a spouse that fact is a complete defence to a charge of accessory after the fact by shelter.⁵⁹ The reasoning of the law is that spouses have a marital obligation to cohabit.

A principal offender may have available to him a defence absolving him from responsibility for the offence he is alleged to have committed. The

⁵³ Section 100 (1).

⁵⁴ s. 324 (1)(2)).

⁵⁵ Section 99 (2).

⁵⁶ Section 194 (1).

⁵⁷ Section 100 (1).

⁵⁸ Section 194 (2)

⁵⁹ Section 100 (2).

accessory can avail himself of that defence, but only if the principal offender has been acquitted following a successful plea of the absolute defence.⁶⁰

§5. Accessory to the preparation of a felony or misdemeanour

A person may be liable as an accessory even though the felon or misdemeanant is not aware of his assistance⁶¹. Further, a person who aids or facilitates the *preparation* of a felony or a misdemeanour is accounted guilty under section 97 (1)(b) as an accessory. The logic of the law here is odd and the Code is not consistent with itself. Section 97(3) declares that mere preparation does not constitute an offence. If mere preparation is not punishable then it is bad law to make accessoryship to mere preparation punishable. Preparation is not a crime. Therefore, aiding or facilitating that conduct cannot be a crime. It is indefensible for section 97(3) to make a person liable as an accessory to conduct that is not an offence.

Section 3. Principles governing punishment of co-offenders and accessories

The principles governing the punishment of co-offenders and of accessories are the same. These principles relate to the way these parties to crime are punished, to the effect (if any) of personal and foreseeable circumstances, and to further liability for foreseeable consequences.

§1. Accessory and co-offender punishable ‘in like manner’ as a principal offender

An accessory. As a general rule and subject to any special provision of law, an accessory is “punishable in like manner” as a principal offender.⁶² An accessory is liable to punishment in the same way as a principal offender is. The expression ‘punishable in like manner’ does not mean that the accessory will necessarily be given the same sentence as the single offender. What it means is that he incurs the same penalty as that incurred by the single offence. To illustrate: murder *simpliciter* is punishable by a maximum custodial sentence of life imprisonment. That is the penalty incurred by a person who commits that offence. An accessory to murder is also liable to a maximum custodial sentence of life imprisonment.

⁶⁰ Section 194 (3).

⁶¹ *R. v. Kupferberg* (1918) 13 Cr App Rep 166.

⁶² Section 98 (1).

However, the fact that the court gives the sole offender life does not necessary mean the accessory would also get life. In fact, since accessoryship is secondary participation in crime the tendency is to look at it as less blameworthy than the commission of the principal offence. For that reason, courts tend to consider an accessory as deserving of mitigating considerations and readily punish him less severely than the principal offender. This judicial attitude finds statutory support in section 194(2) which provides for a less severe penalty for an accessory after the fact by shelter than for the perpetrator of the principal offence. It is there provided that where the principal offender is punishable with death, the accessory after the fact by shelter shall be punished with imprisonment for from two to ten years.

Further, some forms of accessoryship carry specific punishment under the law. For example, section 194(1) punishes accessory after the fact by shelter with imprisonment for from two months to two years. Another example is section 324 which prescribes for receiving, the same penalty of ten years' imprisonment as is prescribed for theft. These provisions of law provide specific punishment for two specific forms of accessoryship, namely, accessory after the fact by shelter, and, receiving or disposing of anything procured by the commission of a felony or a misdemeanour. That is what sections 98(1) and 100(3) refer to when they speak of "special provision of law." These sections make allowance for differential statutory punishment as regards an accessory (or a co-offender) and a sole principal offender. In other words, both sections acknowledge that an accessory or a co-offender may not always be punishable in like manner as the sole principal offender. Statute may specifically provide a different punishment for each category of offenders.

Sometimes, however, the law perversely prescribes, but not without some justification, a more severe punishment for an accessory than for a principal offender. For example, under section 340, a mother who kills her own child within one month of its birth stands convicted of infanticide and gets a maximum of 10 years imprisonment. But the abettor of the crime incurs a life sentence. Furthermore, in a situation where the abettor of an offence is in fact the brain and leader of a criminal gang, the court is more likely to punish him more severely than those who actually committed the substantive offence. In this example the linchpin of a drug or human trafficking ring would be punished more severely than the 'mule', who carries the drug, or the pimp, who supplies the women trafficked for the purpose of prostitution.

A co-offender. As a general rule, subject to any special provision of law, a *co-offender* is also “punishable in like manner” as a sole offender.⁶³ Broadly speaking, the same principle applies here as in the case of accessories. If one of several co-offenders has committed all the ingredients of an offence he is punishable for the offence whatever the contribution of the others may have been. The situation is however tricky where among several co-offenders some have not themselves personally committed all the ingredients of the offence. In fact, it may even happen that none of them has himself done everything necessary to warrant his conviction. The note to section 98 gives the hypothetical example of two thieves acting in agreement, one of who opens the door of a house with a false key and the other goes in and takes the money or property there. Both of them will be convicted of theft by breaking in, although one stole nothing and the other did not break in. The note illustrates with further examples the operation of section 98(1) regarding the punishment of a co-offender.

“Again, if one of two bandits threatens their victim with his revolver and the other takes his note-case, both will be convicted of armed robbery, although the first took nothing and the second used no arm. This is not because each is accessory to the part played by the other but because each is responsible for the offence completely committed by them collectively in execution of the will of each individually. It is the same if the result desired by the common agreement flows from the activities of the co-offenders taken as a whole without it being possible to attribute the result more to the acts of one than to those of the other. Where two warders taking it in turn to guard a prisoner agree to kill him by depriving him of food and after some days he dies of hunger they are both guilty of capital murder and punishable equally for it, although it is impossible to say that he was killed directly more by one than by the other. Again if several persons agree to beat a man to death and he dies in consequence of the blows inflicted on him, it matters little who delivered the fatal blow: they are all equally guilty of murder. Without the aid of the principles enshrined in sections 96 and 98 none of them could be convicted of more than attempt, unless it could be proved that his blow was fatal; but under these two sections they are all punishable as co-offenders in respect of the completed offence, and each in the same way as if he had himself done every act which caused the result which each participant desired individually.”

⁶³ Section 98 (1).

The legal principle of holding all the parties guilty is sound. The parties had agreed to commit the offence and had simply apportioned the role of each one. For the purpose of imputing criminal responsibility, the law is indifferent to the specific role, minor or major, assigned to one party.

But different considerations arise where one party withdraws from participation in the commission of the offence agreed upon. The party that has withdrawn, would, on principle, escape liability for the full offence. This point needs further clarification. If participation in the commission of an offence is spontaneous, it is enough for a participant to withdraw from it merely by walking away. In *Mitchell & King*⁶⁴, three men were together in an Indian take-away food facility where a fight soon broke out involving other customers and damage was caused to the take-away facility. The three men then left, followed by some of the staff and another fight broke out between all the men. Eventually the three men walked off. But one of them returned and inflicted fatal injuries on one of the staff who had been lying on the ground. The man who inflicted the fatal injuries was subsequently convicted of murder. The prosecution argued that the other two men were involved in a joint enterprise and ought also to be convicted. The two men argued that they had withdrawn from the enterprise at the time when the fatal blows were struck. The trial court convicted them on the reasoning that there was no effective communication of their withdrawal. Their conviction was quashed on appeal. In *O'Flaherty & Others*⁶⁵, X and two others participated in a spontaneous violence that broke out outside a club. X later stabbed a man to death in a neighbouring street and both he and the two other men were convicted using joint enterprise principles. The conviction of the two others was quashed on appeal on the ground that although they had participated in the initial violence that broke out immediately outside the club, they had withdrawn from the enterprise by the time the man was fatally wounded in a neighbouring street.

The doctrine of withdrawal from participation in crime by merely walking away does not apply in the case of pre-planned criminal activity. There, the party withdrawing must demonstrably do so. Mere change of heart or repentance without action would not be enough. The withdrawing party must communicate his withdrawal, in the language of Dunn LJ in *Whitefield*⁶⁶, in such a way as to “serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw.” And, depending on how advanced the offence is, and as is required in the case of a co-conspirator

⁶⁴ [1999] Crim LR 496.

⁶⁵ [2004] 2 Cr. App. R. 20.

⁶⁶ (1984) 79 Cr App R 36.

withdrawing from a conspiracy (section 95(5)), he must take active steps to prevent the offence. Like McDermott J put it in the context of conspiracy, in the American case of *Eldredge v United States*⁶⁷, “A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step on the fuse.”

In *Becerra & Cooper*⁶⁸, X and Y agreed to commit burglary of a flat. They got into a confrontation with the occupant and the commotion disturbed her neighbour upstairs who came down to investigate. At this point X shouted ‘Come on, let’s go’. He then climbed out of the window and ran off. Y tried to escape but was prevented from doing so by the woman upstairs who had come to investigate the cause of the commotion. There was a struggle and Y who had a knife stabbed the woman to death. X and Y were convicted of murder. X appealed on the ground that, at the time Y stabbed the woman he had withdrawn from the joint enterprise. The Court of Appeal upheld the convictions saying that something vastly more effective was required to be done before Y could be said to have withdrawn.

It was held in *Rook*⁶⁹ that simply failing to turn up on the day that the joint enterprise was due to take place does not constitute an effective withdrawal. In that case a contract killing had been arranged and D was supposed to participate. On the appointed day he simply failed to show up. His accomplices went ahead and carried out the murder without him. D was convicted (as an accomplice) and the Court of Appeal rejected his appeal. D should have made it very clear to the others that he had changed his mind and no longer wanted to take part in the murder. This “minimum necessary for withdrawal from the crime”, said Lloyd LJ, was not established. This decision was confirmed in *Baker*⁷⁰ where a man in the company of two others stabbed the victim three times then handed the knife to the others, saying “I am not doing it”, moved a short distance away and turned his back while the other two men finished the job by inflicting on the victim 45 stab wounds. He was convicted of murder. The Court of Appeal upheld the conviction, dismissing his defence of disassociation from the pre-planned violence. It stated that he had not unequivocally withdrawn from the joint enterprise. His words, “I’m not doing it”, were quite capable of meaning no more than “I will not myself strike any more blows.”

⁶⁷ 62 F 2nd 449 (1932).

⁶⁸ [1975] 62 Cr App R 212.

⁶⁹ [1993] 2 All ER 955.

⁷⁰ [1994] Crim LR 444.

§2. Effect of personal and foreseeable circumstances

What effect, if any, do circumstances personal to the offender or to the victim of an offence have on the way the co-offender or the accessory is to be punished? The law gives two answers to this question. Regarding an offender, the law stipulates that “circumstances resulting in the irresponsibility of any person, or his exemption from punishment or reduction or increase of his punishment, shall, where personal, affect only the person concerned.”⁷¹ Simply put, when it comes to punishment, circumstances personal to each participant in the commission of an offence remain personal to each. Examples of personal circumstances given in section 98(2) are those that result in the person’s irresponsibility (absolute defences of general application), those that result in his exemption from punishment (partial defences of general application), and those that result in the reduction or increase of his punishment (mitigation and aggravation of punishment).⁷²

These examples may be illustrated with the case of a diplomatic agent, an insane person, an infant, a spouse who steals *de facto* (not *de jure*) from another spouse, a defendant who pleads an absolute or a partial defence, an offender whose responsibility is aggravated whether by reason of his previous conviction or of his status or of some specific attribute or circumstance. A diplomatic agent is criminally irresponsible in the receiving state because he has diplomatic immunity. An insane person is criminally irresponsible because he lacks mental capacity. An infant is criminally irresponsible because of his immaturity. No responsibility lies on a person who does an act in lawful defence. The responsibility of a person who does an act under provocation is diminished. A spouse sheltering the other who has committed a felony or misdemeanour⁷³ is exempt from punishment; and so too a close relative who steals an item of necessities from another relative⁷⁴. A person who is a first offender stands to get a reduced sentence but a habitual offender will get increased punishment. Each circumstance is personal to the defendant concerned and will not rob off onto any other defendant, co-offender or accessory, involved in the commission of the offence charged.

The law further stipulates that circumstances other than those that are personal affect any co-offender or accessory who could have foreseen them.⁷⁵ In other words, circumstances that are not personal to the offender will affect any other participant in the crime (co-offender or accessory) if the said

⁷¹ Section 98 (2).

⁷² Here, no account is taken of circumstances personal to the victim.

⁷³ Section 100 (2).

⁷⁴ Section 323.

⁷⁵ Section 98 (3).

participant could have foreseen them. Thus, in the case of robbery, for example, every co-offender or accomplice who could have foreseen that a weapon would be carried and used or who would have known of the existence of the weapon carried by any of the participants in the commission of the offence is punishable with the enhanced penalty of aggravated theft, irrespective of whoever amongst them may actually have carried the weapon. In this example, this or that particular co-offender or accomplice did not carry or use the weapon. But he is held equally guilty of aggravated theft. He is guilty on the sufficient reasoning either that he ought to have foreseen that a weapon would be carried and used in the commission of the robbery or that he should have known that one of the participants in the crime had a weapon.

Circumstances that are not personal to the offender are those that are detached from him; they do not relate to him personally. They include circumstances that relate to the victim of the offence and those that are foreseeable by the reasonable person. In terms of the law, these non-personal circumstances affect the punishment incurred by a co-offender or an accessory. Thus, where the law provides an increased penalty on account of the fact that the victim of an offence is an infant, all co-offenders and accomplices who could have known that the victim is an infant are liable to increased penalty. The circumstance of infancy is personal to the victim. It is a circumstance that is non-personal to any participant in the crime in which the infant is victim.

§3. Liability for foreseeable consequences

A person who agrees and participates with another in committing or attempting to commit a felony or misdemeanour is criminally liable. He is criminally liable as co-offender, not only for that offence but also for any other felony or misdemeanour committed or attempted as a foreseeable consequence of the agreement.⁷⁶ Where of two thieves one is armed, the use of the arm, and even its fatal use, is a foreseeable consequence of their agreement. Both of them, together with their accomplices, will be guilty of any murder that may be committed. If, on the other hand, the armed thief takes advantage of the opportunity to kill a personal enemy who has no connection with the theft agreed upon, neither co-offender nor accomplice is in this case guilty of the murder or of abetting murder. None of them is guilty because the murder of the personal enemy went beyond the scope of the joint enterprise; it departed from the agreed plan.⁷⁷

⁷⁶ Section 99 (1).

⁷⁷ *Anderson & Morris* [1966] 2 QB 110 (agreement by A and B to commit assault but unknown to A, B was armed with a knife which he used in killing the victim; held, A is not

Similarly, a person who instigates the commission of a felony or misdemeanour is criminally liable, as accessory, not only for the offence instigated but also for any other felony or misdemeanour committed or attempted, as a foreseeable consequence of the instigation.⁷⁸ If X instigates Y to blow up an Internet café, it is clearly foreseeable that a consequence of the instigation is that when the café is blown up grievous harm or even death would be caused to persons using that facility or even to passers-by. Both the principal offender and the accessory will be guilty not only of criminal damage to the property but also of any grievous harm or death that may be caused to persons inside or in the vicinity the property. It is immaterial whether the co-offender or the accessory desired the other offence or not. The test of foreseeability here is a subjective rather than an objective one. It is not whether a reasonable person would have foreseen the commission of the other offence as a consequence of the agreement or abetment; it is whether the particular defendant could have foreseen it.

A person is also liable to punishment as an accessory in respect of malefactors of whose felonious conduct he is aware and to whom he habitually furnishes places of refuge or assembly.⁷⁹ The person liable under this provision is not an accessory within the meaning of section 97 which defines an accessory as one who abets the commission of a felony or misdemeanour. Here, the person does not order or in any manner cause the commission of any crime. All he does is that he habitually provides a hide-out or meeting place to malefactors whose felonious activity he is aware of.

This would seem a specific offence punishable as accessoryship on the reasoning that what the person does is in fact to encourage the felonious activity of the malefactors. By doing so he becomes an accessory to any felony committed by the malefactors on the sufficient ground that he foresees the commission by them of the felony that is in fact committed. But clearly he is not an accessory if he does not know what felony the malefactors he shelters are about to commit. However, if he knows that they are in the habit of committing felonies he is responsible in the same way as if he had intended to facilitate the commission of whatever felony is in fact committed. The

guilty of manslaughter; *Lovesey and Peterson* [1970] 1 QB 352 (agreement between A and B to commit robbery but B used extensive force to kill the victim; held that the killing went beyond the scope of the agreement. Contrast: *Betty* (1964) 48 Cr App R 6; *Reid* (1975) 62 Cr App R 109; *Stewart and Schofield* [1995] 3 All ER 159; *Gilmour* [2000] 2 Cr App R 407; *Day, Day and Roberts* [2001] Crim LR 984: in this line of cases, one party in the joint enterprise was held guilty of murder and the other of manslaughter on the reasoning that a person acting as an accessory to a principal who carries out the very deed contemplated by both ought to be guilty of the degree of offence appropriate to the intent with which he so acted.

⁷⁸ Section 99 (1).

⁷⁹ Section 99 (2).

subsection is applicable only in respect of felonies because of the peculiarity of the accessoryship there created.

§4. Theoretical bases for punishing complicity

Single offence test. According to one theory the accessory is punishable in like manner as the principal offender because his conduct is tainted with the criminal act of the principal offender. In terms of this theory the criminality of the act done by the accessory stems from the principal offender's criminal conduct. The accessory's conduct is criminal only because of its association with the criminal act of the principal offender. It is as if both have committed a single offence. Accordingly, both deserve to be punished in the same manner. This 'single-offence' test somewhat strains logic since the accessory does not commit all the ingredients of the offence by and in agreement with the principal offender for if he did then he will cease being an accessory and will become a co-offender.

Autonomous offence test. According to another theory the accessory commits an autonomous offence, distinct from that of the sole or principal offender, meaning that multiple offences have been committed. However, the accessory's offence is in practice less serious than that of the sole or principal offender and so the law ought to provide explicitly that the accessory is punishable less severely than the sole or principal offender. In fact, this is what happens in some European countries. This theory considers only the act done by the accessory and ignores his person as one with a criminal intent.

Conditioned offence test. A third theory is that of the so-called conditioned offence. According to this theory the accessory commits a distinct crime but one conditioned by the main offence committed by the sole or principal offender. This means there must be a main offence punishable in itself. The accessory is therefore punishable not as an accessory to the main offence. He is punishable as a person who has himself committed an offence, though that offence is linked to, and the form which it takes is influenced or determined by, the main offence.

Punishment for degrees of participation in crime. The hands of the lawmaker are not tied when it comes to prescribing penalties for degrees of participation in crime. Parliament may provide punishment for a co-offender or for an accomplice different from that which it provides for a sole or principal offender. This would be consistent with section 2 of the Penal Code. That section provides that any general provision of the criminal law shall be

subject to any special provision on the same matter. It also provides that the Penal Code and every provision of criminal law shall be subject to the rules of international law.

However, the general rule on the subject, propounded in section 98(1), is that an accessory and a co-offender are punishable in like manner as a sole or principal offender. This does not mean that co-offender and accessory are to have the same sentence as a sole or principal offender. It only means that they are *prima facie* punishable under the same law that creates and punishes the offence; they incur the same penalty. They do not have to get the same sentence. Thus, the punishment of an accessory would not be affected by individual circumstances which may mitigate (e.g., infanticide by a mother) or aggravate (e.g., previous convictions) the penalty incurred by the sole or principal offender. If a son kills his father his punishment is aggravated (and so he gets a death sentence) because the crime is no ordinary murder but is parricide, the murder of a father by his own biological child. But the punishment of an accessory to that killing will not be aggravated (he does not get a death sentence), except perhaps if that accessory is also a child of the deceased. Likewise, where the principal offender benefits from some mitigating circumstance such as his age or where his punishment is aggravated on account of his criminal antecedents, this will not affect the penalty incurred by the accessory.

Where a circumstance which aggravates or mitigates the offence is not personal to a principal or sole offender, an accessory or a co-offender would theoretically get the same punishment as the sole or principal offender.⁸⁰ For example, if the victim of an offence is a minor, the circumstance of infancy is not a circumstance that is personal as against, or that attaches to, the sole or principal offender. Theoretically, therefore, an accessory or a co-offender will get the same quantum of punishment as the sole or principal offender. But under s. 98(3) non-personal circumstances affect an accessory or a co-offender only if he could have foreseen them as a reasonable person would. Section 98 applies whether the accessory's act consists of an abetment or an attempted abetment.

Acquittal of principal and conviction of accessory. Even if the alleged principal offender has been acquitted, a conviction of another as a secondary party or accessory may be logical, since a trial court may be satisfied beyond reasonable doubt and finds evidence admissible against the accessory which is not admissible against the principal. This situation is possible only if the

⁸⁰ Section 98 (3).

principal and accessory are tried separately and the evidence against each is markedly different. This is supported by the common law rule laid down in England by the House of Lords in *DPP v. Shannon*⁸¹ in the context of conspiracy. The rule is that the acquittal of one party to a conspiracy does not invalidate the conviction of the other party. The question that arises is whether one party may be convicted of conspiracy when the other is acquitted at the same trial. A party may be so convicted where the strength of the evidence against the two is, in the view of the trial court, so markedly different that each case considered separately could only lead to the conclusion that one party conspired with the other although conspiracy has not been proved against that other party.⁸²

But an accessory cannot be convicted in the absence of a principal. A person cannot be convicted as accessory where there is no principal. The reason is that there must be proof of a crime committed before there can be any question of criminal guilt or participation in it. It is clear that when two crimes have the same physical element and the principal is convicted of the greater crime the abettor may be convicted of the lesser one. So if the passenger of a car urges the driver to drive close to P so as to frighten him, and the driver deliberately runs over P and kills him, the driver will be guilty of murder and the passenger only of manslaughter. The physical element is the same for both crimes but the mental element differs and each party is held liable to the extent of his own mental element.

Although the Code punishes an accessory in like manner as the sole or principal offender, circumstances that are personal to him may mitigate or aggravate the conviction. Withdrawal, for example, is a personal circumstance. But it will not affect any liability if it took place after the crime had been committed. Change of heart or repentance is a personal circumstance. But that alone without any action will not exonerate the person from liability as accessory. His innocent state of mind at the time of the commission of the offence is immaterial. As earlier noted, if the accessory decides to withdraw he must communicate his intention. To be effective the communication must be such as will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdrew. Withdrawal must be voluntary. It must not be due to external influence like police intervention.

⁸¹ [1974] 2 All E R 1009.

⁸² Cf. s. 5 (8) of the English Criminal Law Act 1977; *Longman and Cribben* (1980) 72 Cr App Rep 121, CA.

Inchoate Crimes: Attempt

The criminal trajectory. Ordinarily, steps leading to the commission of an offence are thought, resolve, preparation and execution. A potential offender would usually think of committing an offence. The idea of committing an offence may be just a fleeting thought or it could be a recurring one, and it may be shoved aside for the time being or dismissed altogether. The law is indifferent to mere thoughts of committing an offence. It knows no such thing as ‘thought crime’. So long as a crime is merely in the mind, the person thinking it up incurs no criminal liability. The maxim is *nemo cogitationis poenam patitur* – mere criminal thoughts are not punishable. As a matter of principle, therefore, the law does not punish a person for his intentions alone. The reason why a crime which lies merely in the mind is not punishable is that criminal thoughts often occur to people without any serious intention of putting them into operation.

Even if the criminal thought is avowed or openly declared the person harbouring it cannot, generally speaking, be arrested and prosecuted (except if the avowal amounts to a threat) because merely thinking of a crime and no more does not constitute an offence under the law. A mere intention to commit a crime is not punishable if no steps are taken to carry it into effect. For example, a man who declares, ‘I am going to kill’ or ‘I am going to steal’ commits no offence. He cannot be arrested and prosecuted for murder or for stealing because there has been no murder or theft by him. He cannot be arrested and prosecuted for making the statement because there is no such offence under the law.

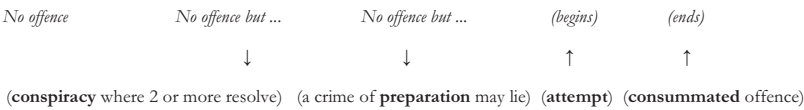
Having thought of committing a crime, the person may consider or weigh the thought in order to make up his mind about the idea. After reflection, he may abandon the idea altogether or resolve to pursue it. Even at this stage the criminal law does not come into play so long as the person keeps the resolve to himself, that is, so long as the resolve is that of just one person. But if the resolve to go ahead with the idea to commit an offence is shared with two or more persons who agree to go along with it, the criminal law abandons its indifference, intervenes and punishes such joint resolution as a conspiracy to commit an offence. The criminal law intervenes because the resolution involves the corruption of a plurality of minds. In the eyes of the law the resolution of a plurality of persons to commit an offence is more dangerous than that of a loner. The criminal law more readily intervenes when some

substantial step is taken to put the criminal desire into effect. So, a man who embarks on committing a crime but who is checked before he can accomplish his purpose may at that point have already committed what is in itself an offence, either a conspiracy or an attempt, as the case may be. Both are inchoate offences.

If he resolves to go ahead with his evil thought the individual may then begin to make preparations for actually carrying out his criminal intent. He may set about reconnoitring the scene of the intended crime; he may set about obtaining necessary instruments for use in committing the intended crime; or may begin to do other ground work preparatory to committing the offence. Again, even at this stage the law does not punish mere preparation, considering the conduct capable of varying possible interpretations and therefore too ambiguous to evince a clear intent to commit an offence. However, if the preparatory conduct appears ‘dangerous’ it may constitute a punishable substantive offence, for example, ‘dangerous preparations’, ‘going equipped’ or ‘loitering with intent’.

After he would have done the necessary preparation for the actual commission of the offence the individual may then embark on the last stage of the criminal trajectory or path (*iter criminis*) which is execution. The execution stage may be described as a continuum with a starting and an end point. The starting point of execution is denoted as ‘commencement of execution’. It is here that liability for attempt attaches. If the individual commences execution and something happens that frustrates the realisation of the offence the individual stands guilty of attempt. The end point of execution is the consummation of the offence. The commission of the substantive offence is complete and the individual faces the full brunt of the criminal law.

Thought → Resolve → Preparation → Execution



Notional steps towards the commission of a crime

Inchoate offences¹. An inchoate offence is one that is at an early stage. It is one that is committed by an act done with the purpose of committing some other crime, the substantive crime. It is sometimes denoted as a preliminary

¹ Williams, op. cit. p. 349; Okonkwo & Naish, op. cit p. 184; Martin J & Storey T, *Unlocking Criminal Law*, 3rd ed., Hodder, London, 2010, chapter 6; Kemp G et al, *Criminal Law in South Africa*, OUP Southern Africa, 2012, chapter 25.

crime or an incomplete crime. Inchoate offences widen the net of criminal justice to deal with incipient criminal behaviour and in some cases they even stretch the substantive criminal law. The main reason for the creation and punishment of these offences is that since the basic object of the criminal law is crime prevention the police should be able to intervene at an early stage of a planned or threatened offence.

The punishment of inchoate crimes therefore rests on the preventive theory of the criminal law. The criminal law punishes certain types of conduct not because they have produced any actual results but because they are harmful in themselves. The harmfulness of such conduct does not rest upon any actual results but upon their tendency to cause the harm to be prevented.² Also, much conduct is made criminal because it tends to promote or facilitate the criminality of other persons, for example, receiving stolen goods, incitement, and accessoryship.

However, in principle it is recognised that inchoate offences ought not to be permitted to proliferate unless the need for them has been demonstrated. So, in England, for example, the law of conspiracy³ is confined to a small number of established categories, viz. conspiracy to pervert the course of justice, conspiracy to corrupt public morals⁴ and conspiracy to defraud. In this country by contrast, the law of conspiracy applies to any criminal offence that is a felony or a misdemeanour.

A peculiarity of inchoate offences is that voluntary withdrawal from or abandonment of the criminal project is a credible 'defence'⁵ available to a person charged with any such offences. Admittedly, in the case of conspiracy the crime is complete as soon as agreement is reached, and, in the case of attempt, an endeavour towards commission of the substantive crime has been made. Thus, even though withdrawal may prevent the substantive crime being committed, it cannot undo the fact that at one stage, at least, the individual concerned would actually have committed the inchoate crime. Nevertheless, the attempter or the conspirator escapes punishment. He escapes punishment because the law gives reasonable encouragement to an attempter or a conspirator to abandon his criminal enterprise, on condition that he does so

² For example, in motoring law reckless driving remains reckless driving whether there is a casualty or whether by good fortune nothing happens.

³ Conspiracy in English law is defined as an agreement between two or more persons to effect an unlawful purpose or a lawful purpose by unlawful means.

⁴ *Shaw v DPP* [1961] 2 All E. R. 446, HL; *Kneller (Publishing, Printing & Promotion) Ltd v DPP* [1972] 2 All E. R. 898

⁵ It is in fact not a formal defence as such. In some cases the fact that there was withdrawal or abandonment is merely reflected in mitigation of the penalty which the court might otherwise impose.

genuinely. The object of the criminal law is undoubtedly crime prevention. But it is equally important to give reasonable encouragement to an attempter or conspirator to withdraw before a substantive offence is committed. The absence of such an incentive might dissuade an individual who might otherwise decide to cease participating in the planning of a crime from taking that decision.

Section 1. Meaning and ingredients of attempt

In ordinary language, to attempt is to try, to endeavour. An attempt in law is an endeavour to commit an offence, carried beyond mere preparation or planning, but short of commission of the contemplated substantive offence. It is thus some physical act which helps towards, and is immediately connected with, the commission of a specific crime. The act done falls short of constituting the intended crime but it cannot reasonably be regarded as having any other purpose than pointing towards the commission of an offence.

§1. Meaning of attempt

By section 94(1), an attempt to commit an offence is “the performance of any *act* towards its commission *unambiguously* indicating an *irrevocable intention* to commit it.” There has to be done some overt act which clearly betrays a determined intention to commit an offence. The law of attempt in the Code thus adopts a test that looks forward from the point of performance of an act to see whether the act in question clearly evinces an unshakable intention to commit the offence. This test is not different from what used to be the ‘Rubicon’ test in England. The test was formulated by Lord Diplock in *DPP v Stonehouse*⁶ in the following dictum:

“Acts that are merely preparatory to the commission of the offence, such as, in the instant case, the taking out of insurance policies are not sufficiently proximate to constitute an attempt. They do not indicate a fixed irrevocable intention to go on to commit the completed offence unless involuntarily prevented from doing so. [The defendant] must have crossed the Rubicon and burnt his boat.”

An attempt is not a mere desire or just an intention to commit a crime. It involves acts not reasonably explicable as other than an endeavour to commit the crime intended. Usually, the overt act also forms a series of acts which

⁶ [1978] AC 55.

would constitute commission of the offence if there was no interruption. In attempt, the effort to commit the intended offence is involuntarily not achieved. Failure is essential to successful conviction for attempt. If there is no failure and the completed offence is committed then liability lies only for the completed offence. The liability for attempt is extinguished by operation of law by reason of its coinciding with another and greater liability, that for the substantive offence, in the same person. In terms of the doctrine of merger, the attempt blends in with the substantive crime committed. A person cannot therefore, in respect of the same conduct, be prosecuted both for an attempt and for the completed crime. However, if a person is charged with the completed offence and only an attempt is proved, he can be convicted of the attempt. Further, if he is charged with attempt, he may be found guilty of it notwithstanding that he committed the completed offence.

No prospective offender ever sets out merely to attempt to commit an offence. He sets out to achieve his purpose and he may or may not succeed. If he commits the intended offence he would have succeeded in achieving his purpose and the law punishes him for that. Where he does not succeed, the failure may be due to one of two causes. He may have, out of his own volition, given up the criminal enterprise. In that case he escapes liability because no offence has been committed. On the other hand, the reason for failure to achieve his purpose may be due to circumstances independent of his will. In that case, the law freezes the facts at the moment when the commission of the envisaged offence fails and considers how far into achieving his purpose the actor had gone. If any act done thus far points to mere preparation to commit the substantive offence then no criminal liability is incurred. But if the act unambiguously indicates an irrevocable intention to commit the offence, there is a punishable attempt.

§2. Ingredients of attempt

The requisite elements of an attempt to commit an offence are: an intention to commit the intended offence, an overt act towards commission of the intended offence, failure to commit the intended offence or the apparent impossibility of commission of the intended offence. A person is guilty of attempting to commit a felony or misdemeanour if he acts intentionally, evinces irrevocably an intention to commit the intended offence, performs at least one act towards commission of the intended offence, and the commission of the intended offence was unsuccessful due to circumstances independent of his will.

Intention. The mental element in attempt, as in most offences, is intention. Intention is inferred from the overt act performed by the actor, which act also marks the inception of the commencement of execution of the contemplated crime. There can be no attempt at an unintentional offence. It is therefore impossible to attempt a crime which by definition cannot be committed intentionally. The actor must have intended to commit all the ingredients of the intended offence with the intention of causing the result which completes it. In *R. v. Mohan*⁷ it was held that attempt requires intention in the true sense, and mere knowledge of the probability, or high probability, or likelihood of the consequences is not sufficient. In *Whybrow*⁸, the Court of Appeal held that, although on a charge of murder, an intention to cause grievous bodily harm would suffice, where attempted murder was alleged, nothing less than an intention to kill would do. It stated that “the intent becomes the principal ingredient of the crime.”

Irrevocable. The intention to commit the offence must be irrevocable. To say that an intention is irrevocable means, linguistically, that the intention must have been there at the beginning, still is, and remains fixed. Irrevocability is inferred from any act performed as at the point when the commission of the intended offence failed or was frustrated or thwarted. The act must be such as to leave no doubt that the person irrevocably intended to commit the offence.

Act. The defendant must have done some overt act towards the commission of the felony or misdemeanour. As an inchoate offence, attempt is a conditioned offence since it does not stand alone but relates to the intended substantive offence: attempted murder, attempted theft, attempted rape, attempted corruption etc. Attempt by and of itself has no ingredients. The ingredients of an attempted offence are in reality ingredients linked to the envisaged offence. That is why the act performed must tend towards the substantive offence. The overt act in question must serve a double purpose; first, as an ingredient of the felony or misdemeanour attempted; and, second, as evidence of unambiguous intention to commit the felony or misdemeanour.

Involuntary abandonment. An attempt is not punishable if the actor, out of his own free will, abandoned his effort to commit the intended offence. The abandonment may be due to the actor's change of mind, his lack of enthusiasm, his lack of resolve or firmness to go ahead, or his desisting from what he had set his mind to do. However, the actor does not escape liability

⁷[1976] QB 1, [1975] 2 All ER 193

⁸(1951) 35 Cr App R 141.

for attempt if the commission of the intended offence was unsuccessful due to a circumstance independent of his own free will, whether that circumstance is of human or natural agency. For example, the commission of the offence is frustrated at the nick of time either by chance, some fortuitous happening or some third party intervention.

In the South African case of *R v Hlatwayo and Another*⁹, Ms Hlatwayo was a domestic worker who decided to poison her employers by putting caustic soda into the food she was cooking for them. Another employee saw her and threatened to inform on her. Ms Hlatwayo then decided to throw out the poisoned food. Her conviction by the lower court for attempted murder was confirmed on appeal by the High Court. The Court held that her conduct in putting the poison into the food, which she knew was going to be eaten by members of the household, had gone beyond an act of mere preparation and amounted to an attempt to commit murder. The Court observed that the fact that she thereafter voluntarily desisted from completing her criminal purpose did not exonerate her from liability for attempted murder. It is submitted that the sound legal basis for this decision is that the consummation of the offence failed because of a circumstance independent of the defendant's will: third party intervention (another employee seeing the poison being put into the food and threatening to report the defendant) frustrated at the nick of time the consummation of the crime. The defendant's desisting from completing her criminal purpose was therefore not voluntary.

Where D voluntarily withdraws or abandons the criminal project there is no punishment. He escapes punishment because the law gives the attempter a reasonable encouragement to abandon his criminal enterprise, provided he does so genuinely.¹⁰ Where, however, it is shown that the commission of the substantive crime failed due to circumstance independent of the actor's will, there is a punishable attempt and the attempter will be guilty. The withdrawal or abandonment is involuntary if it is due to such extraneous causes as lack of time, lack of will or lack of perseverance or due to some unexpected interference or intervention. In *Jones v. Brooks*¹¹, a car snatcher was convicted of attempted theft. He was caught trying to get into the car and drive away. He was only prevented from doing so by the car doors which were securely locked. Examples of other factual situations come to mind. A would-be murderer who cannot shoot down his 'victim' because of shaky hands or wobbling knees would be convicted of attempt because lack of success is due

⁹ 1933 TPD 441.

¹⁰ But repentance, apology, or remorse, for a crime already committed, invites different considerations.

¹¹ (1968) 52 Cr. App. R. 614.

to a circumstance of fact independent of his will. A burglar who scales a wall and is prevented from breaking into a house because of the alarm system will equally be convicted because he did not wish the alarm system to be there. A would-be killer whose objective fails because the dose of poison he administered to his victim was inadequate stands convicted of attempt because his failure to consummate the crime of murder resulted from inadequacy of the means used.

Section 2. Scope of the law of attempt

§1. Law of attempt confined to serious crimes

The law of attempt applies only to serious offences, that is, felonies and misdemeanours, and these are also intentional crimes. Summary offences, crimes of omission and unintentional crimes are beyond the reach of the law of attempt. An attempt to commit a simple offence is not indictable presumably because simple offences have a lesser element of criminality and are therefore of relatively low importance. An attempt to commit an offence by omission or to commit an unintentional offence is also not indictable. The definition of attempt in section 94 (1) refers to the performance of ‘any act’. There must be an act. It is therefore not possible under the Code to convict a person for attempt to commit a crime which can only be committed by omission, or to attempt to commit a result crime by omitting to act when under a duty to act solely on that basis.

Similarly, since attempt is an intentional crime, intention is essential. It follows that where an offence cannot be committed intentionally there can be no liability for an attempt to commit it. Under the Code, therefore, there is, for example, no offence of ‘attempted unintentional killing’; ‘attempted rash driving’; or ‘attempted negligence’ or ‘attempted carelessness’ or ‘attempted recklessness’ in doing something. In *Attorney-General’s Reference (No 3 of 1992)*¹², a petrol bomb was thrown from a moving car. It narrowly missed a parked car in which four men were sitting and two other men were standing nearby, and smashed into a wall. The bomb-throwers were charged with attempted aggravated arson. The prosecution’s case was that the criminal damage was intentional and that the men had been reckless as to whether life would be endangered. The judge ruled no case to answer on the ground that an attempted crime could not be committed without intent and that it was impossible to intend to be reckless. It had to be shown that the men intended to damage property and to endanger life. It was held on appeal that this was

¹² [1994] 2 All ER 121.

wrong. The Court of Appeal reasoned that it was enough that the men intended to damage property, being reckless as to whether life would be endangered. It is submitted that the ruling by the Court of Appeal would be bad law under the Penal Code of this country.

§2. Preparatory acts generally not indictable as attempt

Generally, the law excludes mere preparation from the reach of liability for attempt¹³. Any act done before the inception of attempt has been reached, the line of demarcation being commencement of execution, constitutes mere preparation which, in the language of s. 94(3), is not indictable. An act which is merely one of preparation for the commission of a crime and not the inception of the actual commission of it will not constitute an attempt¹⁴. In *Gullefer*¹⁵, a man placed an £18 bet on a greyhound race (i.e., a dog race). Seeing that his dog was losing, he climbed onto the track in front of the dogs, waving his arms and attempting to distract them. In doing so he wanted to get the stewards to declare ‘no race’, in which case he would get his stake back. The man was unsuccessful in this endeavour. He was prosecuted for attempted theft and convicted. The conviction was quashed on appeal on the ground that the man’s act was merely preparatory. Had he gone to the bookmakers and demanded his money back then he would have been guilty of attempted theft.

In *Jones*¹⁶, a man had been involved for some time in a relationship with a woman. He discovered that she had started seeing another man and that she no longer wanted to continue with their relationship. The man bought a shotgun and shortened the barrel. One morning he went to confront the other man as the latter dropped his daughter off at school. The man got into the other man’s car, wearing overalls and a crash helmet with the visor down and carrying a bag. He took off the loaded sawn-off shotgun from the bag and pointed it at the other man saying, “You are not going to like this.” At that point the other man grabbed the end of the gun and pushed it sideways and upwards. There was a struggle during which the other man threw the gun out of the window. The man was charged with attempted murder. His conviction was upheld by the Court of Appeal. Taylor LJ said that obtaining the gun, shortening the barrel, loading the gun, and disguising himself were clearly preparatory acts. However, once the man got into the other man’s car and

¹³ Section 94 (3).

¹⁴ *R. v. Robinson* [1915] 2 KB 342.

¹⁵ [1990] 3 All ER 882.

¹⁶ [1990] 3 All ER 886.

pointed the loaded gun, then there was attempt. But in *Campbell*¹⁷, a man wearing a motorcycle crash helmet and armed with an imitation gun, approached to within a yard of a post office door. He was arrested by the police. His conviction for attempted robbery was quashed by the Court of Appeal. Watkins LJ thought that too many acts remained undone. Those that had been performed – making his way from home, dismounting from his motorbike and walking towards the post office – were clearly acts which were indicative of mere preparation.

There may also be exceptional situations where the law punishes mere preparatory acts as an autonomous offence.¹⁸ The law does so on the sufficient reasoning that through those acts the defendant shows himself to be a dangerous man prepared to break the law when it suits him. The law also does so for the additional reason that the acts in themselves are a menace to peace and tranquillity in society. This is the rationale for the section 284 offence which criminalises conduct denoted as ‘dangerous preparations’ (i.e. ‘going equipped’). It is also the rationale for some treason-type offences which punish preparatory acts, even though such acts are analytically mere preparations and thus too remote to constitute an attempt.

Also, under certain circumstances preparatory act(s) could take the form of a clear and firm agreement between two or more persons for an offence to be committed by one of them or all of them or a certain number of them. In such a case *conspiracy* would lie, for which a conviction would be in order. In one French case a hired killer backed off at the nick of time from assassinating his quarry when he saw her approaching and took pity on her. It was held that there was no attempt because withdrawal had been voluntary.¹⁹ The court did not consider the fact that there had been a conspiracy between hirer and the would-be assassin. The case was heavily criticised but was defended on the ground that the road to repentance should never be closed and that both justice and the interest of society require it.

It is an offence under section 94 to attempt to commit a felony or a misdemeanour. But sometimes an attempt to commit an offence is at the same time a completed offence in itself. If D passes a counterfeit bank note to V, with intent to defraud, hoping to be given change for it, he is guilty of an attempt to cause loss to V by false pretences²⁰ and also of the consummated offence of uttering counterfeit note²¹. Further, in certain cases conduct that is

¹⁷ [1991] Crim LR 268.

¹⁸ Cf. the new offence of ‘criminal preparation’ recommended in 2007 for England by the Law Commission in its Consultation Paper *Conspiracy and Attempts* (Paper No 183).

¹⁹ *Affaire Lacour*, 25/10/1962; Dalloz 1963, p. 221, Note Bouzat.

²⁰ Section 94 as read with s. 318 (1)(c).

²¹ Section 211 (1)(c).

in fact a mere attempt is punished as a substantive crime. For example, what section 111 punishes as ‘secession’²² is in fact a mere attempt to infringe the territorial integrity of ‘the Republic’. Similarly, what section 114 punishes as ‘revolution’²³ is in fact an attempted coup d’état.²⁴

Section 3. Where preparatory acts end and attempt begins

Section 94 clearly distinguishes between acts of preparation and acts constituting an attempt. Preparatory acts precede any act constituting an attempt. But where is the boundary between the two? When can it be said that D’s conduct has gone beyond mere preparation and has reached the point of attempt? Supposing D, intending to commit murder, buys a gun and some bullets. He does target practice. He studies the daily routine of his intended victim, reconnoitres the area, looks for a suitable place to lie in ambush, puts on a disguise, and takes up position waiting for his intended victim to come by. These may all be considered as mere preparatory acts not capable of creating liability for attempted murder. But supposing that D takes up position, loads the gun, sees his intended victim approaching, raises the gun, takes aim and just as he pulls the trigger or is about to do so, he is stung by a bee or an object interposes between him and his intended victim so that he misses²⁵. Many would argue that at the point where the commission of the intended murder was interrupted there is an attempt. But interruption could also have occurred at any of the earlier stages described.

At the heart of this vexed question are two competing interests. There is the problem of how to protect individual freedom by not intervening too early in a manner which amounts to punishing mere intentions. There is also the

²² This offence is defined as “undertak[ing] in whatever manner to infringe the territorial integrity of the Republic.” ‘Territorial integrity’ is not a domestic but an international law concept; and ‘Republic’ is not the same thing as state territory.

²³ This offence is defined as an “attempt to alter the laws composing the Constitution or to overturn the political authorities set up by the said laws or to render them incapable of exercising their powers”.

²⁴ The offences denoted as ‘secession’ and ‘revolution’ are no more than attempt-offences for the added reason that a successful secession, a successful revolution, would put the perpetrators beyond the reach of these criminal offences. Further, secession being an attempt-offence a person cannot be charged with *attempting* “to undertake to infringe the territorial integrity of the Republic”; and, likewise, revolution being an attempt-offence a person cannot be charged with *attempting* “to attempt to alter the laws composing the Constitution or to overturn the political authorities set up by the said laws or to render them incapable of exercising their powers”. A charge of attempting to attempt is as much a legal nonsense as is one of conspiracy to attempt.

²⁵ As happened in the movie *The Jackal* where the would-be assassin missed his intended target, the movie President De Gaulle of France, because at the precise moment when the trigger was pulled the intended victim just happened to have bowed his head.

problem of how to serve the countervailing interest of the public by intervening early enough when there is a sufficient manifestation of the existence of a serious public danger. Some jurisdictions have met this problem of balancing individual and public interests by creating intermediary offences such as going equipped, procurement, criminal preparation, threats, possession, and so on.

The critical issue relating to the line of demarcation between preparation and attempt is a matter about which opinions may well differ and continue to differ. Some would argue that there is no rule-of-thumb test and that essentially it is a matter of degree. Various tests such as the objective test, the subjective test, and so on, have been proposed, especially in academic writing, regarding the threshold which, when reached, there would be liability for attempt. For some, an attempt lies when the actor does an act which at the time of interruption clearly shows he was determined to pursue his conduct to the end. For others, an attempt lies when the act done points directly and immediately to the commission of an offence. According to another view, there is an attempt if the act done leaves no doubt as to the actor's determination to commit the intended offence.

§1. The objective and subjective tests

Objective test. The objective test postulates that the stage of attempt is reached at the moment when the actor does any act defined by law as a constituent element of the intended offence. This test is expressed in various ways. Some say the prospective offender must have taken a '*substantial step* towards the commission of the crime'²⁶; others say he must have taken 'the *first step* towards the commission of the crime'; still others say he must have done an act that is '*proximate* to completion'²⁷ or dangerously close to completion' of the intended offence'²⁸; and others again say he must have taken the '*final step* to completion' of the intended offence, that is, done all that is necessary for him to do in order to bring his crime to completion'²⁹. It is

²⁶ But the words 'substantial step' are not words of much precision in themselves and do not tell us how close the step is to the commission of the crime.

²⁷ The rationale of the proximity rule lies in the pragmatic attitude that one must draw the line somewhere. Clearly, as academic writers have observed, it is one thing to point out the difficulties inherent in the equivocal test and it is another to propose a substitute for it. It is difficult to escape from Kenny's conclusion that "no abstract test can be given for determining whether an act is sufficiently proximate to be an attempt."

²⁸ *Eagleton* (1855) Dears 515.

²⁹ This test is somewhat along the lines of the test devised by Lord Lane CJ in *Gullefer* [1990] when he said a person commits an attempt when he has "embarked on the crime proper." That phrase means beginning to commit an ingredient act of the intended offence. In *Jones* [1990], Taylor LJ agreed with this test.

doubtful that this linguistic turn of phrases is of much help.³⁰ Take, for example, the following two old South African cases.

In *R v Sharpe*³¹, a person of that name threatened to shoot one Smith. He then left, fetched a loaded gun, and returned to look for Smith. He was, however, arrested before he could find him. He was convicted of attempted assault and he appealed. Held, on appeal, that mere acts of preparation, though done with criminal intent, do not amount to attempts to commit a crime and are not punishable. It was further held that the acts done by Sharpe were mere acts of preparation and did not amount to an attempt. In the appellate court's opinion, if Sharpe had found Smith, his preparation would have been complete and any further step taken by him towards accomplishing the crime would have amounted to an attempt. In *R v Nhlhovo*³², the accused wanted to kill a man called Jacob. He gave a young boy, Nhlana, some poison and told him to put into Jacob's food, saying it was medicine. The boy did not do so, but handed the poison over to Jacob. The accused was subsequently convicted of attempted murder. It was held on appeal that accused's act of procuring the poison was merely an act of preparation and did not amount to attempted murder. Did the conduct of the accused in giving the poison to the boy, with the instruction to put it into Jacob's food, take matters further and so made it a punishable attempt? The Appeal Court held that since the boy deposed that he never intended to carry out the accused's instruction, the boy's involvement did not take matters any further. Therefore, the conduct of the accused did not amount to attempted murder. The Court added that if the boy had gone ahead and put the poison in Jacob's food as instructed, then the accused would indeed have been guilty of attempted murder. But, the accused had done all that was necessary to achieve his purpose. He would have succeeded but for a circumstance independent of his will, namely, the betrayal of the boy in handing over the poison to Jacob instead of putting it in Jacob's food as he was instructed to do. Arguably, there was an attempt.

Subjective test. The subjective test posits that what matters is not so much the overt act by the actor but his intention. This test lays stress on proof of intention rather than on proof of conduct. A major criticism of this test is that it could lead to a miscarriage of justice in the sense that it may result in criminal liability for mere intention. In terms of the subjective test the

³⁰ The 'final step' test is open to the following objections. It is difficult to see how it can be applied to serious offences; for example, attempted rape would not be possible. The test allows persons who might be thought deserving of punishment to escape it. It allows intending offenders to advance far in their conduct before effective intervention can take place. It makes the task of the police more difficult.

³¹ 1903 TS 868.

³² 1921 AD 485.

threshold of attempt is reached the moment it is evident that the actor intends to carry on to the very end with his criminal project. This means a criminal attempt exists when the moral gap between the overt act and the intended offence is so feeble that all things being equal the actor would have achieved his goal of consummating the intended offence. Concretely, the actor has reached in his mind a stage of no turning back from the crime he has set his mind on committing. He has, in the words of Lord Diplock in *Stonehouse*, “crossed the Rubicon and burnt his boat”. He has reached a point from which it is impossible for him to retreat. This is the ‘Rubicon’ test adumbrated by Lord Diplock in *DPP v Stonehouse* [1978] and adopted by the Court of Appeal in *Widdowson*³³.

§2. The ‘unequivocal’ test

The most difficult aspect of the law of attempt is, as already noted, determining how far the intending offender must have gone towards the realisation of his purpose before he can be deemed to have attempted the offence. The problem is not resolved by saying that mere preparatory acts will not suffice. Nor is it resolved by saying that the prospective offender must have gone beyond the stage of mere preparation. That would be begging the question because it is not always clear or easy to recognise at exactly what point preparation ends and attempt begins. In other words, identification of the threshold or the line of demarcation between acts which are merely preparatory and acts which may amount to an attempt is often a difficult problem. The Code tries to face this problem by settling for the unequivocal or *res ipsa loquitur* test, thus rejecting both the ‘objective’ and the ‘subjective’ tests used in some jurisdictions.

According to the unequivocal test, there is an attempt when the act done is univocal or unequivocal, that is to say, the act done is susceptible to only one possible interpretation. In terms of this view, the act done must be such as to clearly and unequivocally indicate of itself the intention to commit the offence. If the act is equivocal, attempt would not lie. The Penal Code opts for the unequivocal test. This test posits that D’s act, standing alone, is unequivocally consistent only with his intention to commit the substantive crime. D’s act lends itself to no other possible interpretation than that he intends to commit an offence.

However, despite its theoretical soundness the unequivocal test does not resolve this particular difficulty in the law of attempt because no act is in fact truly unequivocal, that is to say, unambiguous or completely clear in meaning.

³³ (1986) 82 Cr App R 314.

For example, supposing a person makes a careful sketch of a house he is planning to burgle, including the manner in which he intends to enter. Is he guilty of attempted burglary? According to the unequivocal test, the act of the defendant, standing alone, must be unequivocally consistent only with his intention to commit the intended offence. In the example given, it may be doubted that the sketch by and in itself is completely clear in meaning and unequivocally speaks to a design to burgle the house. Consider also the following English cases. In *Geddes*³⁴, a man went in the boys' toilet of a school. He was discovered by a member of staff. He ran off, leaving behind a rucksack, in which were found various items including string, sealing tape and a knife. He was charged with attempted false imprisonment of a person unknown. He was convicted, but the conviction was quashed on appeal because of serious doubt that the man had gone beyond the stage of mere preparation. Applying the unequivocal test to this case one would be inclined to conclude that the conviction by the trial court was justified because the items left behind by the man when he escaped from the scene are consistent with an intention to seize someone, gag him and tie him up.

In *Tosti & White*³⁵, two men drove to a barn which they planned to burgle. They had with them oxy-acetylene equipment which they concealed in a hedge. It was towards midnight. They approached the door of the barn and examined the padlock using a light. They then became aware that they were being watched and ran off. One of the men claimed that they had gone to the barn to try and find water because their car engine was overheating. The other man admitted that they were on a reconnaissance mission with a future aim to burgle the barn. The conviction of both men for attempted burglary was upheld by the Court of Appeal. If one applies the unequivocal test to this case one is bound to conclude that the convictions were wrong.

In *Nash*³⁶, a man left in a street three letters addressed to 'Paper boy'. Two of the letters contained invitations to engage in mutual masturbation and/or oral sex with the author. The third letter was signed 'JJ' and purported to offer work with a security company. The police got a paper boy to meet the writer of the third letter in a local park and there the man asked the boy whether he was looking for 'JJ'. The man was arrested and convicted of three counts of attempting to procure an act of gross indecency. The Court of Appeal rejected the plea of mere preparatory acts and confirmed the conviction with respect to the first two letters but allowed the appeal with respect to the third. A court in

³⁴ [1996] Crim LR 894.

³⁵ [1997] Crim LR 746.

³⁶ [1999] Crim LR 308.

this country applying the unequivocal test would arrive at the same decision. In *Toothill*³⁷, a woman saw a man standing in her garden at about 11 pm, masturbating. She called the police and the man was arrested. A knife and a glove were found in the woman's garden and a condom was found in the man's pocket. The man admitted knocking at the woman's door but claimed that he was lost and seeking directions. The man was convicted of attempted burglary. His appeal was dismissed. The man will not be convicted if the unequivocal test is applied to this case.

The application of the unequivocal test may not produce entirely satisfactory results. Take the following foreign cases. In *Campbell & Bradley v. Ward*³⁸, a New Zealand case, the defendants entered a parked car. When they were spotted by police officers they fled the scene. Defendants were subsequently apprehended and they confessed that their purpose in entering the car was to steal a battery and radio. Their conviction for attempted theft was reversed on appeal on the ground that their acts alone (exclusive of the confession) were too equivocal to establish intent. The court would have arrived at the same result even if the two defendants had told an innocent third party that they planned to steal the said objects from the car and the third party had reported this to the police.

In *R. v. Robinson*³⁹, a jeweller insured his stock against theft for £1500, concealed some on the premises, tied himself up with string and called for help. He told the police who broke in that he had been knocked down and his safe robbed. The policeman was not satisfied with the story. A further search revealed the property concealed on the premises. The jeweller then confessed that he had hoped to get money from the insurers. He was convicted of attempting to obtain money by false pretences but the conviction was quashed on appeal on the ground that what he had done constituted mere preparatory acts. In *Komaromi*⁴⁰, the defendants trailed a lorry for 130 miles, even giving assistance to it when it broke down awaiting a chance of stealing it and its £34 000 load. It was held that the conduct did not constitute an attempt but only a continuous act of preparation. In *Comer v Bloomfield*⁴¹, the defendant drove his vehicle into a wood to hide it, and inquired of the insurers whether a claim would lie for its loss. It was held that there was no attempt to obtain money by deception.

³⁷ [1998] Crim LR 876.

³⁸ (1955) N.Z.L.R. 471.

³⁹ [1915] 2 KB 342.

⁴⁰ (1953) 103 L Jo 97.

⁴¹ [1971] Crim LR 230.

Apart from the fact that the application of the unequivocal test may not produce entirely satisfactory results, the test does not entirely dispose of the problem of the exact moment at which there is attempt because sometimes an act may be unequivocal and yet still ambiguous. The point may be illustrated with some English cases. In *R. v. Button*⁴² entries for two handicaps⁴³ at a public athletic meeting were made in the name of one Sims whose recent race performances were very moderate. So, at this particular athletic meeting it was decided to give Sims long starts. In fact, Sims was absent at the athletic competition. D personated Sims and was given long starts in the two races, and being a good runner won both. Held, that the defendant made the false pretences wilfully, intentionally and fraudulently, in order to obtain the prizes and was therefore guilty of attempting to obtain by false pretences. The court dismissed as ‘exceeding subtle, but unsound’ the argument that some other act had to be done in order to make the offence complete and that it must be shown that he had applied for the prizes.

By contrast, in quashing the conviction in *R. v. Robinson*⁴⁴, the Court of Appeal reasoned that whereas in *Button* D had made the false pretences, in *Robinson* D was merely preparing the evidence of the false pretence which he never made. *Comer v. Bloomfield* was also distinguished on the grounds that though D in that case had written to his insurers enquiring whether he could make a claim this constituted only a preliminary inquiry, a preparatory act for which he might have desisted before making an actual claim. This was held to be insufficiently proximate to constitute an attempt.

In *Campbell & Bradley v. Ward*⁴⁵ D’s act was held not to be an attempt because it was not sufficiently proximate and unequivocal. In the view of the court, the act was sufficiently proximate but not unequivocal. In *R. v. Eagleton* (1855) *Dears* 515, Parke B said, “If D has done the last act which he expects to do, and which it is necessary for him to do in order to achieve the consequence alleged to be attempted, he is guilty.” This seems a sound rule. But as was observed in *R. v. White*⁴⁶ and in *R. v. Linnecker*⁴⁷, a man may be guilty of an attempt even though he has not gone so far and may have contemplated the administration of further acts. An attempt can be committed although the defendant has not reached the last act he intended before the crime or the penultimate act. It is the case that courts tend to interpret attempt

⁴² [1900] 2 QB 597.

⁴³ A ‘handicap’ is a contest in which competitors are given advantages or disadvantages in an attempt to equalise their chances.

⁴⁴ [1915] 2 KB 342.

⁴⁵ [1955] NZLR

⁴⁶ [1910] 2 K.B. 124.

⁴⁷ [1904-7] All ER Rep 797; [1906] 2 KB 99.

more widely in some offences (e.g. in sexual offences) than in others, which makes it even more difficult to draw the line between preparatory acts and attempt.

In *Attorney-General's Reference (No 1 of 1992)*⁴⁸, a man was charged with the attempted rape of a woman but was acquitted. On appeal, it was held that there was enough evidence on which he could have been rightly convicted. In *Khan*⁴⁹, four men were convicted of an attempted rape of a 16-year-old girl. All four had tried to have sex with her, unsuccessfully. Their convictions were upheld. In *Jones*⁵⁰, D wrote graffiti on the walls of train and station toilets seeking girls aged 8 to 13 for sex in return for payment and requesting contact via his mobile phone. A journalist saw one of the messages and contacted the police who began an operation using an undercover policewoman pretending to be a 12-year-old girl called 'Amy'. D sent several texts to 'Amy' in which he tried to persuade her to engage in sexual activity. Eventually, 'Amy' and D agreed to meet at a fast food joint, where he was arrested. He was convicted of attempting to excite a girl under the age of 13 to engage in sexual activity. His conviction was upheld on appeal.

In *Bivée Paul v. Ministère Public*⁵¹, an appellate court in Cameroun upheld the conviction of a man for attempted incestuous rape of his nine-year old daughter. The medical report tendered as evidence in the case stated in its conclusion that there was a "strong presumption of defloration" of the child. The brief facts of the case are that on 19 March 1965 in the village of Mekok II, the prisoner, Paul Bivee attempted to rape his 9-year old daughter Ndemba Jeanette. He lay on the little girl and tried to penetrate her with his erect penis but could not succeed because the girl's vagina was too small and her mother happened to have arrived at the scene at that very moment. On these facts the court held that there was attempted rape. In the view of the court attempted rape occurs when a person does acts that demonstrate his intention to have sexual intercourse. In *Onkoué Moïse v. Ministère Public*⁵², the defendant, a soldier, had two children with his sister, Esther, through a long incestuous relationship. In order to enable her to obtain family allowance with which to support those children he worked out a scheme to marry her and for that purpose filed a formal application with the military authorities for permission to marry. Held, that the application for permission to marry was a sufficient act of commencement of execution of an attempt to obtain money by false

⁴⁸ [1993] 2 All ER 190.

⁴⁹ [1990] 2 All ER 783.

⁵⁰ [2007] 3 WLR 907.

⁵¹ Arrêt No. 65 du 9 Janvier 1968, *Bulletin des Arrêts de la Cour Suprême du Cameroun Oriental*, No. 18, 1968, p. 196.

⁵² Arrêt No. 50 du 26 Novembre 1968, CSCO, unreported.

pretences and that the offence had failed simply because it was factually not possible for the incestuous marriage to have been celebrated. The court reasoned that “there is commencement of execution [i.e., commencement of consummation of the offence] from the moment when the actor, having put together all the means required for him to act, resolves to use them and, betraying his criminal intention, decides to run the risk of the criminal purpose.”⁵³

Section 4. Attempting the impossible

The offender may have done all that is necessary to bring about the consummation of the intended offence but to no avail. The endeavour has borne no fruit. It has not materialised in the commission of the intended offence. D has done all that is necessary to achieve his purpose but consummation of the offence is impossible or fails to materialise. More often than not the endeavour fails because the means deployed to consummate the offence proved inadequate or because commission is factually or legally impossible. Where commission of the intended offence is impossible the situation is one of ‘impossible crime’ or ‘attempting the impossible’.

An impossible crime situation arises where the constituent ingredients of a punishable offence are all present but the offence has failed to materialise due to physical impossibility or legal impossibility. A situation of physical impossibility arises when the factual circumstance is unknown to the actor, as where he attempts to pick a person’s pocket, but unknown to him the pocket is in fact empty; or where he attempts to kill B by stabbing him with a dagger but, unknown to him B who he stabs had died earlier of natural causes. On the other hand, a situation of legal impossibility arises when a circumstance of law is unknown to the actor, as where A handles goods, believing them to be stolen, when they are not in fact stolen.

§1. Impossibility of law

Impossibility of law implies the absence of a constituent ingredient of the intended offence. For that reason, the conduct does not constitute a punishable attempt. Legally, it is impossible to commit the intended crime due

⁵³ “Attendu que le commencement d’exécution existe à compter du moment où l’agent, ayant réuni les moyens de son action, entreprend d’en faire usage et, dévoilant sa volonté delictuelle, décide de courir les risques de l’entreprise.”

to facts unknown to the person.⁵⁴ Examples are where a man ‘steals’ property that turns out to be his own; where a man shoots at close range someone lying in bed intending to kill him but in fact that person was already dead; where a man believes his conduct to be an offence but in fact the conduct in question has been de-criminalised. Impossibility of law also arises where the state of affairs forbidden by the criminal law exists only in the defendant’s mind, a situation sometimes referred to as a putative crime. For example, a man thinks he is committing bigamy by going through a ceremony of marriage with another woman in the mistaken belief that his estranged wife is still alive whereas in fact she had died. An unsuccessful attempt due to impossibility of law is in fact no attempt at all and is accordingly not punishable because in the law of attempt it must be shown that what the actor intended would have constituted an offence had his effort succeeded.

§2. Impossibility of fact

Impossibility of fact is in reality impossibility of the end in view. The intended crime is impossible of commission. It cannot be brought about at all. Examples are, picking an empty pocket intending to steal from it⁵⁵; pulling the trigger of a gun which unknown to D is unloaded; lacing a drink with poison with intent to kill, even though in fact the dose could not possibly have killed anyone⁵⁶; shooting to kill V in his bed but in fact what was shot at was a dummy arranged to look like a person. Liability in these cases is analogous to liability in cases of mistake. The defendant is held liable on the facts as he believed them to be. A ‘successful attempt’ due to impossibility of fact or due to the end in view is thus punishable. The conduct is a punishable attempt because the commission of the substantive offence has, in the language of section 94(1), “been arrested or has failed solely by reason of circumstances independent of the offender’s will.”

§3. Inadequacy of means or methods

In certain situations the offence is physically and legally possible but, in the actual circumstances it is impossible to commit the substantive offence due to the inadequacy of the means or methods that were to be used or that were actually used. In such a case liability for attempt will lie. If A attempts to break into a house using a saw-edged plastic knife so as to gain ingress, or if A attempts to kill by administering what in fact is a non-fatal dose of poison, or again if A, an excellent marksman, attempts to kill by shooting B who in fact is

⁵⁴ *R. v. Percy Dalton*.

⁵⁵ *R. v. Ring* (1892) 8 T.L.R. 326.

⁵⁶ *R. v. White* [1910] 2 K.B. 124.

out of shooting range, A will not escape liability for attempt by pleading inadequacy of the means or methods used. The inadequacy of the means or method is a fact he was not aware of.

The decision of Ngayi J sitting in the Manyu High Court in the case of *The People v Agbormbi Angelina Besong*⁵⁷ was thus wrong. In that case the accused, a lady, gave a greenish substance to a boy to put in the mouth of a new-born baby, the child of her husband's mistress. The boy did and later disclosed that he had been sent by the accused to put the substance in the mouth of the child. The accused was arrested and charged with attempted capital murder by poisoning. During the trial medical evidence was adduced to the effect that the substance which came out of the child's mouth was not poisonous. In holding that the accused was not guilty as charged the learned trial judge said,

“If accused intended to kill by poisoning and used a substance which is not poisonous, the *actus reus* could never be achieved. Intentions without the realisation of *actus reus* are not punishable ... Exhibit D shows that the substance was not poisonous. The administration of the substance could not amount to attempting to killing by poisoning.”

It is submitted that the learned Judge failed to advert his mind to the fact that the harmlessness of the substance was a circumstance unknown to the accused. The accused intended to commit murder by poisoning and had done all she could to kill by poisoning; but the killing did not materialise only because of the inadequacy of the means she used. It is further submitted that she should therefore have been convicted as charged. In *White*⁵⁸, a man gave his mother an insufficient dose of poison, intending to kill her. He was convicted of attempted murder.⁵⁹

In *Shinpur*⁶⁰, D was persuaded to act as a drugs ‘mule’ or courier. He was instructed to receive drugs and to transport them somewhere else. D duly collected a suitcase which he believed contained either heroin or cannabis. The suitcase contained several packages of white powder, one of which D took to the delivery point. There, he was arrested. He was subsequently charged with attempting to be ‘knowingly concerned in dealing in prohibited drugs’. The charge was laid despite the fact that the white powder was not drugs at all. It was legal stuff or some similar harmless vegetable matter. D was nevertheless convicted and his conviction was upheld by the Court of Appeal and also by

⁵⁷ (1987) Manyu High Court, Charge No. HCM/18c/87, unreported.

⁵⁸ [1910] 2 KB 124.

⁵⁹ Confirmed in *Haughton v Smith* [1975] AC 476.

⁶⁰ [1987] AC 1.

the House of Lords.⁶¹ Lord Bridge provided the following rationalisation for the conviction:

“The concept of ‘objective innocence’ is incapable of sensible application in relation to the law of criminal attempts. The reason for this is that any attempt to commit a crime which involves an act which is more than merely preparatory to the commission of the offence but which for any reason fails, so that in the event no offence is committed must *ex hypothesi*, from the point of view of the criminal law be ‘objectively innocent’. What turns what would otherwise ... be an innocent act into a crime is the intent of the actor to commit an offence.”

It is submitted that a court in this country, applying section 94 to the facts in *Shivpuri*, would arrive at the same conclusion as did the English courts. The fact that the substance in question in that case was not drugs is a circumstance of fact unknown to D who, moreover, intended to commit the offence, the commission of which failed solely by reason of circumstances independent of the will of D. D’s conduct had gone beyond mere preparatory acts. D cannot therefore possibly escape liability for attempt.

Section 5. Punishment for attempt

§1. Attempt punishable in the same way as completed offence

The law treats an attempt as the commission of the offence attempted and punishes it in the same way as the completed offence (s. 94(1)). Thus, for example, attempted murder is treated as the actual commission of murder and is punishable in the same way as the actual murder. What this means is that theoretically if a man attempts to kill he will be punished as if he actually killed. An attempter may be sentenced to the same penalty as that provided for one who consummates offence. The reasoning of the law is that a person contemplating a crime does not think he is going to be unsuccessful because if he thought so he would not bother trying in the first place. Since he hopes to succeed, he is not going to concern himself with the penalty for an attempted offence. From a deterrent standpoint, therefore, it makes sense to punish an attempt as severely as the completed offence.

In practice, the punishment for inchoate crime is generally less than for the consummated crime. If a man shoots at another, intending to kill him, and

⁶¹ *Shivpuri* overruled *Anderton v Ryan* [1985] AC 560 in this regard and was followed in *Jones* where, as already seen, D was convicted of attempting to incite a child under 13 to engage in sexual activity.

succeeds, he is liable to be sentenced to life imprisonment.⁶² If he misses, although he could well receive a life sentence, in practice he will probably be treated much more leniently. Often, the attempter receives a discount of something up to 50% or more. But sometimes an attempt carries a mandatory sentence, such as under section 114 where what is in effect an attempted coup d'état is punishable with a mandatory life imprisonment.

§2. Rationale for punishing attempt

Why should the law punish mere attempt? The unsuccessful attempter is punished for purposes of general and particular deterrence. Were the attempter not to be punished at all the law would be communicating the message that next time he should be more determined and make sure he succeeds. Letting off the attempter would also weaken general deterrence, which depends upon society's success in making things unpleasant for malefactors. Attempt is also punishable because it is a manifestation of dangerousness, which is just as great as in the case of purposive conduct. The crime of attempt is necessary to punish those who have demonstrated themselves to be a manifest danger to society, i.e., those who have taken one or more affirmative steps towards the commission of a crime.

⁶² Section 275.

Inchoate Crimes: Conspiracy, Dangerous Preparations and Attempted Abetment

Attempt is not the only inchoate offence in the Penal Code. The Code provides for other inchoate offences. These are conspiracy, and what is denoted as ‘dangerous preparations’, and ‘attempted abetment’. In these latter two cases, the law intervenes at a much earlier stage than is generally warranted. The law intervenes to punish wrongful conduct which, though still somewhat vague, nevertheless calls for early preventive action.

Section 1. Conspiracy

The law has always been wary of the concerted actions of two or more persons bent on perpetrating an unlawful act. For example, in England, it did not take long before the following inchoate offences entered the statute book: conspiracy to defeat the ends of justice, conspiracy to pervert the course of justice¹, conspiracy to commit a public mischief, conspiracy to corrupt public morals² or outrage public decency³, and conspiracy to defraud⁴. In France, the political instability and generalised insecurity in that country in the nineteenth century prompted the creation of inchoate offences such as *conspiration*⁵, *association des malfaiteurs*⁶ and *complot*⁷. In modern times the crime of conspiracy has been found an exceedingly useful and valuable weapon in the prosecution of persons involved in large-scale organised crime such as drug trafficking⁸, money laundering⁹, human trafficking, terrorism, and cyber criminality.

¹ *Jackson* [1985] Crim LR 442.

² *Shaw v DPP* [1962] AC 220; *Knulier v DPP* [1973] AC 439.

³ *Gibson & Another* [1990] 2 QB 619.

⁴ *Scott v MPC* [1975] AC 818; *Cooke* [1986] 2 All ER 985; *Ghosh* [1982] 2 All ER. Developed by the Court of Star Chamber in the 17th century and taken over by the common law courts, conspiracy was not only a crime but also was a tort though the law remained obscure until the decision of the House of Lords in *Crofter Hand-Woven Harris Tweed Co. Ltd. v Veitch* (1942) A.C. 435.

⁵ The term carried the meaning of a secret agreement between two or more persons to overthrow the government.

⁶ Criminal gangs or confederates.

⁷ Any agreement with a view to commit any offence against the internal or external security of the state.

⁸ *Siracusa* (1989) 90 Cr App R 340: conspiracy to import heroin.

⁹ *Saiki* [2007] 1 AC 18: conspiracy to launder stolen money; *Tree* [2008] EWCA Crim 261: conspiracy to convert the proceeds of crime into cash.

§1. Meaning

In ordinary language to conspire means to plot or scheme together. Conspiracy within the meaning of section 95 (1) is “the resolve concerted and determined between two or more persons to commit an offence.” Conspiracy exists the moment there is a *firm agreement* to commit a particular crime. It is punishable as a stand-alone crime. Therefore, it is not necessary to show that the substantive crime was indeed committed. Nor is it necessary to show that the coming together was for a secret purpose, though conspiracy cases usually involve coming together for a secret purpose. The whole purpose of the law of conspiracy is to allow the criminal law to intervene at an early stage to punish those who agree to commit a crime, even if they do not actually succeed in committing it.¹⁰

Firm agreement to commit a specific offence. Those involved in a conspiracy must *firmly agree* on the commission of a *specific offence*. That is what is meant by the expression “a resolve concerted and determined”. This requirement underscores the fact that conspiracy is an intentional offence. Mere deliberation, sounding of opinion, or discussion would not do. In *Walker*¹¹, D clearly discussed with others the proposition of stealing a payroll. The parties had not gone beyond the stage of negotiations when D withdrew. It was held that D’s conviction must be quashed. Likewise, mere vague agreement to commit an offence would also not do. There must be agreement to commit a specific offence. In *Barnard*¹², a man agreed to assist what he thought was a conspiracy to commit theft. In fact, the others had agreed to commit robbery. The Court of Appeal quashed the man’s conviction on the basis that an agreement to commit theft was not equivalent to an agreement to commit robbery which is a far serious offence than theft. Similarly, in *Taylor*¹³, the Court of Appeal decided that an agreement to import class ‘B’ drugs was not equivalent to an agreement to import class ‘A’ drugs which is more serious than importing class ‘B’ drugs. In *Siracusa* (1989) O’Connor LJ said that if the prosecutor charged a conspiracy to import heroin, then the prosecution must prove that the agreed course of conduct was the importation of heroin. “This

¹⁰ In the case of *The People v Bikelle Alexander Bikson & Sarah Enanga Etoke* (1983), Buca High Court, Suit No. HCB/29c./83, unreported, the defendants agreed to steal 11,000 francs by issuing a bad cheque drawn from the Cameroon Bank. The Court had no difficulty in finding them guilty of conspiracy to defraud the Bank. But in *Thomas Mosenja v The People* (No. 2) (1971) UYLR 32 where the appellant was charged along with two others for conspiracy to steal 85,000 francs, the property of the West Cameroon Government, the charge was dismissed for lack of evidence of a resolved concerted and determined between the accused.

¹¹ (1962) Crim L R 458.

¹² (1980) 70 Cr App R 28.

¹³ [2002] Crim LR 205.

is because the essence of the crime of conspiracy is the agreement and, in simple terms, you do not have an agreement to import heroin by proving an agreement to import cannabis.” It follows from these decisions that, reasoning *a contrario* and because the greater includes the lesser, if a man agrees to commit a more serious offence than his co-conspirators, he may be held liable for conspiracy.

A single person not indictable for conspiracy. The firm agreement to commit a specific crime must involve at least two parties since a person cannot conspire with himself. But a person may alone be convicted for conspiracy if the co-conspirators are not known or are dead or are not charged, provided there is proof of agreement. If two persons are alleged to have conspired and one has a defence, the other person may be convicted of conspiracy only if the person who has a defence is not charged. If both are charged the person who has a defence will be acquitted on the reasoning that a person cannot conspire with himself.

§2. Ingredients

Mental element: intention. The mental element is the intention to commit each ingredient act of the contemplated crime, that is, the intention to participate in the purpose for which the agreement was reached. If a conspirator fails to stop or to report the commission of the intended offence, this might be construed as indicative of his intention to participate in it.

Secret intention not to commit the offence agreed upon. A sham conspiracy situation may arise where one of two persons who agree to commit a crime secretly has no intention of seeing it through. It may also arise where a pretended conspirator who is in fact an undercover agent of a law enforcement agency agrees with someone to commit an offence. According to one English authority, a person cannot be convicted of conspiracy unless he intended that the agreement be seen through to its completion.¹⁴ But in *Anderson*¹⁵ the House of Lords held that in order for liability for conspiracy to arise it is not necessary that a co-conspirator intends to see through the commission of the offence. In that case D agreed with two others, for a fee of £20,000, to purchase and supply diamond wire, a product capable of cutting through prison bars. The wire was to be used to enable the brother of one of the men to escape from prison where he was on remand awaiting trial on charges of serious drug offences. D was also to provide rope and ladder,

¹⁴ *Thompson* (1965) Cr App R 1.

¹⁵ [1985] 2 All ER 961.

transport, and safe accommodation where the would-be jail breaker could hide out. D was charged with conspiracy to effect the escape of a prisoner.

His defence was that he had no intention of seeing the plan through to its conclusion, that he hoped to collect most of the £20,000 after supplying the diamond wire, that he was going to use the money to travel to Spain and take no further part in the escape plan, that he doubted that the escape plan would succeed, and that therefore he had no intention to see the remandee escape from prison. His conviction for conspiracy was upheld by the House of Lords. The judgment was delivered by Lord Bridge who explained the decision of the House in terms of “the diversity of roles which parties may agree to play in criminal conspiracies”:

“I am clearly driven by consideration of the diversity of roles which parties may agree to play in criminal conspiracies to reject any construction of the statutory language [of the English Criminal Law Act 1977] which would require the prosecution to prove an intention on the part of each conspirator that the criminal offence or offences which will necessarily be committed by one or more of the conspirators if the agreed course of conduct is fully carried out should in fact be committed ... In these days of highly organised crime the most serious statutory conspiracies will frequently involve an elaborate and complex agreed course of conduct in which many will consent to play necessary but subordinate roles, not involving them in any direct participation in the commission of the offence or offences at the centre of the conspiracy. Parliament cannot have intended that such parties should escape conviction of conspiracy on the basis that it cannot be proved against them that they intended that the relevant offence or offences should be committed.”

This decision must have been a nightmare for law enforcement agencies since they sometimes use some of their officials as undercover agents to infiltrate organised crime rings. Inevitably, these agents make agreements with criminals to appear as credible and *bona fide* conspirators but, in fact, never intending to commit the crime which is the object of the ‘conspiracy’. Going by *Anderson* such undercover officers would be liable to conviction as conspirators. When confronted with this specific issue of officers working undercover to try to infiltrate organised crime operations, the courts at first hesitated as, for example, in *Somchai Liangsiriprasert*¹⁶. In that case US drug enforcement officers infiltrated a plot to import drugs into the USA with the

¹⁶ [1991] AC 225.

object of entrapping the drug dealers. The Privy Council left open the question whether the undercover officers were guilty of conspiracy.

However, in another case decided four years later the Privy Council was emphatic that conspiracy would lie though the officers would probably not be prosecuted. In *Yip Chiu-Cheung*¹⁷ there was a drug smuggling operation between Hong Kong and Australia. The operation involved an undercover agent working for the United States drugs enforcement agency. A plan was agreed upon whereby the undercover agent would fly from Australia to Hong Kong, collect the drugs from a supplier and return to Australia with them. The drug supplier was convicted of conspiracy and appealed, unsuccessfully. The Privy Council held that there had been a conspiracy between the drug supplier and the undercover agent. It ruled that the fact that the undercover agent was not prosecuted did not mean that he did not intend to form an agreement with the drug supplier to transport drugs. It follows from this case that an undercover agent who agrees with criminal gang leaders or crime lords to commit an offence is guilty of conspiracy though he would not be prosecuted. It is submitted that a court in this country applying section 95 to the facts in *Anderson* and in *Yip Chiu-Cheung* would arrive at the same decision as did the House of Lords and the Privy Council in those cases.

Details on the envisaged offence. There is conspiracy as long as the parties have reached general agreement to commit an offence. It need not be shown that they have a perfect agreement on every minute detail of the offence to be committed. It need not be shown that they agreed on the means of committing the offence or that there was commencement of execution of the offence. It is sufficient that there is common agreement on what exactly is to be done even though the exact details on each step to be taken are still left to be determined. In *Broad*¹⁸, two men were convicted of conspiracy to produce a class 'A' drug. One of them thought they had agreed to produce heroin while the other thought they had agreed to produce cocaine. This detail was held to be irrelevant.

Envisaged offence to be committed on condition. The law is the same where the agreement or intention to commit the substantive crime is conditional. Suppose two or more men agreed to rob a bank on a particular date *if*, when they get to the bank, it is quiet there or the coast is clear. Suppose also two men agree to burgle a house but only if it is unoccupied or not alarmed. In either case the men are guilty of conspiracy notwithstanding that

¹⁷ [1994] 2 All ER 924.

¹⁸ [1997] Crim LR 666.

the commission of the substantive offence is subject to a condition. The conditionality does not relate to the agreement to commit an offence but to the actual commission of the offence.

In *Reed*¹⁹, two men agreed that a third man would visit people contemplating suicide. The third man would, depending on his assessment of the most appropriate course of action, either provide faith healing, consolation and comfort while discouraging suicide, or actively help them to commit suicide. The two men were convicted of several counts of conspiracy to aid and abet suicide. On appeal it was argued that, if the agreement is capable of being successfully completed without a crime being committed, there is no conspiracy; moreover, in the present case, the agreement was capable of execution without the law being broken, and therefore they were wrongly convicted. The court rejected the argument and upheld the convictions. The conspiracy was complete the moment there was a firm agreement on the commission of a specific offence. In *Jackson*²⁰, C was on trial for burglary. A and B agreed with C to shoot C in the leg if C was convicted. They believed that this rather queer measure would induce the trial judge to sentence C more leniently, presumably out of pity. They were convicted of conspiracy to pervert the course of justice. The Court of Appeal held that,

“Planning was taking place for a contingency and if that contingency occurred the conspiracy would necessarily involve the commission of an offence. ‘Necessarily’ is not to be held to mean that there must inevitably be the carrying out of the offence; it means, if the agreement is carried out in accordance with the plan, there must be the commission of the offence referred to in the conspiracy count.”

The physical element: the common resolve. The physical element of conspiracy is the common resolve, the joint firm agreement. The resolve is a plot or plan and an act in itself. In *Mulcahy v. R*²¹, Willes J said,

“A conspiracy consists not only in the intention of two or more, but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, [is] capable of being ... punishable if for a criminal object.”

¹⁹ [1982] Crim LR 819.

²⁰ [1985] Crim LR 442.

²¹ (1868) L.R. 3 H.L. 306 at 317.

The gist of conspiracy thus lies in the forming of the agreement between the parties. The crime is complete as soon as there is a 'resolve'. There need be no further act, and it is unnecessary for the prosecution to show that there was a further act, done in pursuance of the firm agreement. The resolve must be "concerted and determined" between two or more "persons". This means there must be an agreement mutually reached and firmly concluded between at least two persons. Mere negotiations, mere discussions, mere declared common purpose, or mere vague understanding would not be enough because in law such do not constitute an agreement. In *R v Walker*²² the defendant and two other men were convicted of conspiracy to rob. The only evidence against the defendant consisted of a lie which he had told the police and a voluntary statement in which he said that the co-defendants had asked him if he knew anyone who was interested in stealing a payroll. He introduced them to a man who was interested, but after discussion, he, the defendant, decided to pull out as he did not fancy the job. The question that troubled the Court of Appeal was whether what had occurred so far as the appellant was concerned had passed from the sphere of negotiation or intention and had become a matter of agreement. His conviction was quashed because it was not proved that the defendant had gone beyond the stage of mere negotiations. In the law of conspiracy, it must be shown that each accused had agreed with another guilty person, in relation to that single conspiracy.

Since a conspiracy comes into existence as soon as there is a resolve between two or more conspirators, the resolve continues until the substantive offence is either performed, abandoned or frustrated²³. More parties may thus join a subsisting conspiracy at any time until then.

Proof of conspiracy. In conspiracy both the mental element, intention, and the physical element, the common resolve or agreement, in fact operate on the mental plane. This makes it rather difficult to establish with certainty the element of common resolve. In the face of this difficulty the court is apt to make the irresistible inference from certain preparatory acts by the parties that they had a common resolve. Moreover, since conspiracy is always done in private or secretly, direct evidence of it might be difficult to have. Such evidence is however not indispensable. It is open to the trial court to infer conspiracy from the fact of things done by the parties towards a common end. On most occasions therefore proof of conspiracy would be by circumstantial, and to some extent hearsay, evidence.

²² [1962] Crim LR 458.

²³ *DPP v Doot* [1973] AC 807.

The prosecution need not prove that the conspirators knew that the act they agreed to do, or the agreement to do such an act, was illegal. Ignorance of the law is no excuse. However, if on the facts known to the parties, what they agreed to do was lawful, they cannot be rendered artificially guilty of conspiracy by the existence of other facts not known to them, giving a different criminal quality to the act agreed upon.²⁴

§3. Some specific issues relating to the law of conspiracy

Corporate liability for conspiracy. Section 95 speaks of ‘persons’. It is thus an open question whether the parties to a conspiracy need be only physical persons. On principle a company may be indicted for conspiracy. A company is a legal entity, a juristic person, distinct and separate from the physical persons who constitute it. Therefore the company can conspire with its shareholders to commit an offence and such conspiracy would be indictable. Similarly, a company can conspire with a third party, a physical person or even with another company.

Conspiracy locally to commit a crime abroad and vice versa. A conspiracy in this country to commit an offence abroad is indictable in this country if the offence that is the object of the conspiracy is punishable by the law of the place where it is intended to commit the offence. Similarly, a conspiracy abroad with a view to commit an offence in this country is indictable in this country as well.²⁵

Rolling, wheel and chain conspiracies. It is not necessary that agreement be reached at one meeting where every conspirator is present. There may be a rolling conspiracy where the ringleaders of the conspiracy agree to commit an offence and then set out to recruit others into the conspiracy. There may be a wheel conspiracy where the hub of the conspiracy is an individual who recruits others, individually, into the conspiracy without the others knowing or meeting each other. There may also be a chain conspiracy where a conspirator recruits a co-conspirator who then recruits another co-conspirator, and who in turn recruits yet another conspirator and so on. In any of these cases it must be shown that there is a common purpose or design between the conspirators, and that each alleged conspirator has communicated with at least one other²⁶, although no one need be identified²⁷. If there is no common design then there are separate conspiracies and not just one.

²⁴ *R v Churchill* [1967] 2 AC 224.

²⁵ Section 9.

²⁶ *Scott* (1979) 68 Cr App R 164.

In the law of conspiracy physical propinquity is clearly not necessary as contacts can be made by land phone, cell phone, telex, fax, SMS, Internet, Facebook, LinkedIn, twitter, Whatsapp, or other social media. Again, the mere fact that the parties to the conspiracy do not know each other is of no moment since the whole scheme can be worked out by a single person who seeks and obtains their consent.

Law of conspiracy confined to serious crimes. Since conspiracy is the resolve concerted and determined between two or more persons to commit an offence, it might be thought that conspiracy is indictable no matter the type of offence involved. But s. 95(3) confines the law of conspiracy to serious crimes, that is to say, to felonies and misdemeanours. In terms of that provision, a conspiracy to commit a felony or a misdemeanour is treated as the commission of the felony or misdemeanour that was the object of the conspiracy. This would seem to suggest that simple offences do not fall within the law of conspiracy. A conspiracy to commit a simple offence is considered conduct that is not really serious.

Intended victim of the object of conspiracy cannot be guilty of conspiracy. It is clear from the definition of conspiracy that the intended victim of the object of the conspiracy cannot be guilty of conspiring to commit an offence of which he is the victim. Suppose an under-aged person agrees to have sex with an older person. The under-aged person cannot be convicted of conspiring to commit that offence because she is the intended victim of the offence of having sex with minors. The offence of having sex with under-aged persons is created for the protection of those persons. In *Tyrrell*²⁸, a girl under 16 years old allowed a man to have intercourse with her. The girl was convicted of aiding and abetting the offence of unlawful sexual intercourse. The conviction was quashed on appeal on the ground that the purpose of creating the offence was to protect young girls against themselves. According to Lord Coleridge the policy of the law is that statutes should be construed so that they do not criminalise those they are designed to protect. There was no conspiracy to commit unlawful sexual intercourse because the girl was the victim of the offence. By the same token a person cannot be convicted of conspiring with a person below the age of criminal responsibility (under ten years of age).

§4. Husband and wife immunity for conspiracy

²⁷ *Philips* (1987) 86 Cr App R 18.

²⁸ [1894] 1 QB 710.

Husband and wife can of course conspire. But the law exempts them from the law of conspiracy.²⁹ In other words, husband and wife cannot be convicted of conspiracy as they are in law fictionally considered as one person³⁰; and one person cannot conspire with himself.³¹ In *Lovick*³², Mrs Lovick's conviction was quashed because the prosecution failed to establish that anyone other than she and Mr. Lovick were involved in the conspiracy.

Whether this exemption is limited to spouses in a monogamous marriage or it extends to spouses in a polygamous marriage is an open question. There is no authority on the point. But on principle there is no reason why 'husband and wife' should discriminatorily be construed as referring only to spouses in a monogamous marriage and not to spouses in a polygamous marriage since polygamy is a legally recognised form of marriage in this country. Admittedly, the section 95(2) spousal exemption from conspiracy speaks of 'wife', not 'wives'. But it is a well-established rule of statutory construction that the singular includes the plural.

The immunity for husband and wife from the law of conspiracy may be thought controversial for it means that if H and W agree to murder or to assault or to steal or to commit any serious crime, no conspiracy lies. But if they were just lovers and did exactly the same thing they would be convicted of conspiracy. This might be thought capricious on the part of the law and in some jurisdictions spousal immunity for conspiracy does not exist or, if it existed, has now been abolished.

But the spousal immunity applies only as between husband and wife *inter se* and not as between a spouse and a third party, such as a spouse and some other person (even another member of the family) or a spouse of one marriage and a spouse of another marriage. Accordingly, there can be conspiracy between husband and wife, on the one hand, and a third party, on the other hand. In *Chrastny*³³, there was evidence that Mrs Chrastny had conspired with her husband to supply cocaine and that she knew he had conspired with others. There can also be conspiracy between a married person and another person; or between co-wives in a polygamous marriage. The co-wives are not exempted from the law of conspiracy because the section speaks of 'husband'

²⁹ Section 95 (2).

³⁰ *R v Manning* (1849) 2 C & K 904; *Kowbel v R* (1954) 4 DLR 337.

³¹ *Laila Jhina Manji & Another v R* [1957] 1 All ER 385 justified the spousal immunity for conspiracy on the ground that it is an attempt by the criminal law to prevent the disclosure of marital confidences in the course of legal proceedings. Another justification is based on the old and hardly credible notion of the sanctity of the matrimonial home and the stability of marriage.

³² [1993] Crim LR 890.

³³ [1992] 1 All ER 189.

and ‘wife’ rather than of ‘spouses’. Thus a conspiracy between two wives in a polygamous marriage to murder their husband would be indictable. *Seemle*, that a conspiracy between ‘married’ homosexual partners would also be indictable, for it is doubtful that parties in a so-called same-sex marriage are exempt from the law of conspiracy. Same-sex marriages are not legal in this country; in fact homosexuality is a crime. Besides, it is not clear who in such a relationship is ‘husband’ and who is ‘wife’.

§5. Interruption of execution of the contemplated offence

Conspiracy is a joint agreement to commit an offence. The moment an act is done towards the actualisation of the conspiracy the conduct moves beyond conspiracy to another form of criminal conduct, say attempt or even consummation of the offence for which the conspiracy was formed. If at the time of interruption or abandonment of the conspiracy an act has been done towards the execution of the common intention, conspiracy ceases and the conduct at that point becomes indictable either as an attempt (if the act unambiguously indicates an irrevocable intention to commit an offence) or as the completed offence (if the act amounts to consummation of the envisaged offence). The erstwhile conspirators become attempters or co-offenders. It follows that unlike attempt which merges in the consummated offence, conspiracy does not, and therefore conspirators who successfully commit the crime they plotted to commit can be charged both with the crime and the conspiracy. But this is a practice disapproved of by English courts³⁴ since in England, unlike in this country, cases are usually tried with a jury and there is concern that inadmissible evidence might be let in if the issues are not kept separate.

In this country the prosecuting authority sometimes charges both conspiracy and the consummated offence in the hope that should the charge on the substantive offence fail the accused persons would still be caught by the conspiracy charge. Sometimes also they prefer to lay a conspiracy charge where they could have charged the consummated offence. But the courts deprecate this practice and have not hesitated to strike out the conspiracy charge or count where there is evidence of the complete crime.³⁵

³⁴ *R. v. Dawson* [1960] 1 All E.R. 558.

³⁵ In *The People v Sammy Banji Claire, Emeka Celestin and Oliver Ndukwe* (1983), Buea High Court, Suit No. HCB/29c/83, unreported, where there was evidence of the consummated crime of counterfeiting, the court struck out the count of conspiracy to counterfeit the country’s national currency. Likewise, in *The People v Kum Ngab Denis and Ngusha Augustine* (1983), Buea High Court, Suit No. HCB/3c/83, unreported, the conspiracy count was struck out where the defendants were charged with forgery and conspiracy to alter pay vouchers prepared for BICIC bank Tiko. In some cases a conviction on the conspiracy count is

The attitude of the courts seems to be that a conspiracy charge in such cases would be unfair to the accused and that in any event once the offenders have gone beyond the conspiracy phase and committed the substantive crime the conspiracy merges into it and ceases to be of value. Sound prosecutorial practice dictates this course even though on principle both conspiracy and the substantive crime may be charged. The reason is that charging conspiracy in such cases would be considered an exercise in over-kill and as a case of prosecutorial harassment. Accordingly, if the substantive crime cannot be proved it is unlikely that the conspiracy charge will stand and, generally, it is always dropped.

By section 95(3), a conspiracy to commit an offence is indictable where the envisaged offence could in fact not be committed solely by reason of circumstances independent of the conspirators' joint will. From this it appears that the fact that the commission of the envisaged offence is impossible would not excuse the conspirators for liability for conspiracy. The reason is that conspiracy already exists at the moment of a firm agreement between the parties to commit a particular offence and the fact that commission of the offence turns out to be impossible is no defence to a conspiracy charge.

In *DPP v Nock*³⁶, two men resolved to extract cocaine from a powder, which they believed was a mixture of cocaine and lignocaine. In fact the powder was pure lignocaine hydrochloride, an anaesthetic used in dentistry, which contains no cocaine at all. Their convictions for conspiracy to produce a controlled drug were quashed on appeal on the reasoning that it was physically impossible to extract cocaine from the powder. This decision was statutorily overruled by the Criminal Law Act 1977 which provides that a person is guilty of conspiracy even if it would be impossible for the agreement to be carried out as intended.

This provision in the English Criminal Law Act 1977 is in line with what obtains under the Penal Code of this country. Conspiracy thus lies where execution of the object of the conspiracy has been frustrated or interrupted by some cause other than the joint will of the conspirators. Where the interruption is due to the will of one of them in opposition to the others, the others remain fully responsible for the conspiracy while the one who prevents its execution though guilty is entitled to an absolute discharge.

overturned on appeal and only the conviction on the count relating to the substantive offence is upheld: *The People v Suffer Franc & 15 Others* (1975) Bamenda Court of Appeal, Criminal Appeal No. BCA/19c/75, unreported; *The People v Sylvester Ngeh & 2 Others* (1978), Bamenda Court of Appeal, Criminal Appeal No. BCA/9c/78, unreported.

³⁶ [1978] AC 979.

§6. Joint voluntary abandonment of the conspiracy

Where the conspirators jointly abandon the scheme of committing the envisaged offence, they incur no liability. It would therefore seem that the law does not punish conspiracy *per se* but only where the conspirators, by not abandoning their plan, are determined to go ahead with the object of the conspiracy. Although conspiracy has been consummated and thus manifesting a dangerous intent on the part of those involved, it is nevertheless believed that as a matter of criminal law policy conspirators should be given the incentive to give up their joint criminal enterprise. Where, however, the envisaged offence could not be committed due to circumstances independent of the joint will of the conspirators (such as the factual or legal impossibility of committing the crime), the conspirators remain liable for conspiracy and are punishable as if they had actually committed the offence they conspired to commit.³⁷

Where a co-conspirator voluntarily withdraws from the conspiracy before execution of the envisaged offence has commenced, his responsibility is diminished even though he does not betray the other conspirators such as by reporting them. The remaining conspirators remain fully responsible.³⁸ Where a conspirator betrays his confederates by preventing or frustrating the commission of the envisaged offence or by informing the relevant authorities of the conspiracy in advance of any attempt at execution of the conspiracy, he gets an absolute discharge while the other co-conspirators remain fully responsible.³⁹

In appropriate circumstances, a greater penalty may be imposed for conspiracy to commit an offence than that laid down for the substantive offence itself. One reason is that the agreement or concurrence of several persons in the execution of a criminal design is a proper ground for raising the penalty imposed on them above what would be proper in the case of a sole offender. Another reason is that where there is a conspiracy to contravene the law on a large or continuing scale, that fact is sufficient justification for imposition of a greater punishment than that provided for the substantive offence.

§7. Conspiracy and attempt distinguished

Conspiracy is not a 'collective attempt' in opposition to so-call 'individual attempt'. Attempt is one thing, conspiracy another. An attempt does not become a conspiracy simply because there are more than one perpetrators

³⁷ Section 95 (3).

³⁸ Section 95 (4).

³⁹ Section 95 (5).

involved. The conspiracy offence is clearly distinguishable from attempt although certain ingredients are common to both. One person cannot be indicted for conspiracy because a conspiracy supposes an agreement between two or more persons. It is an abuse of language to say a person conspires with himself. If a person alone resolves with determination to commit an offence he cannot be charged with conspiracy because his resolution is not in concert with another person. He cannot be charged with attempt either because to do so would be to impose liability at a much more earlier stage than is required for the offence of attempt – imposing liability in fact for mere thoughts.

Now, whereas a conspiracy cannot be committed by a single person, an attempt may be committed by one person. Conspiracy is punishable at a much earlier stage (i.e., when a person agrees with one or more other persons to commit a specific crime) than is an attempt. Conspiracy is consummated as soon as two or more persons have resolved in concert and with determination to commit an offence. The conspirators need not have gone beyond that stage such as by moving on to the stage of preparation or commencement of execution. But in the case of attempt, neither a simple resolve to commit an offence nor mere preparation to commit an offence is punishable. The offence of attempt is consummated only at the moment when there is commencement of execution. Once there has been a ‘commencement of execution’ (which expression is defined as ‘the performance of some act towards the commission of a felony or misdemeanour unambiguously indicating an irrevocable intention to commit the offence’), and a failure to consummate the substantive crime solely by reason of circumstances independent of the perpetrator’s will, then the offence of attempt is consummated whether there be just one or more than one perpetrator.

Section 2. Dangerous preparations and attempted abetment

Exceptionally, the law sometimes intervenes at a much earlier stage than is generally warranted and punishes certain incipient acts as substantive offences. Two examples are the offences denoted as ‘dangerous preparations’ and ‘attempted abetment’.

§1. Dangerous preparations

Section 248 (1) punishes as ‘dangerous preparations’ the mere carrying of any instrument whatsoever fit for forcing entry into any immovable property with the intention there to commit a felony or misdemeanour. The word ‘preparation’ in this context refers to being in possession of a ‘housebreaking’ instrument. The preparation is characterised as ‘dangerous’ because the

instrument in question is fit for forcing entry into an immovable property and there to commit a serious crime (e.g., theft, rape, murder, grievous bodily harm, arson, destruction). The crime of 'dangerous preparations' is more of an inchoate offence. It is consummated when a person, with intent to commit a felony or misdemeanour, carries any instrument fit for forcing entry into any immovable property. The offence is constituted by the mere possession on one's person of such an instrument with intent to commit a serious crime in a building. The prescribed penalty is imprisonment for from 10 days to 1 year.

In order to secure a conviction under section 248 it is not necessary to show that the accused actually forced entry into a building. It is sufficient to show merely that the accused had with him an instrument fit for forcing entry into a building with the intention of committing therein an offence characterised as a felony or a misdemeanour. Where the accused intended to commit a mere summary offence the section is inapplicable. Similarly, the section is inapplicable where the building was actually broken into, in which case the breaking in and the specific offence committed in the building after the breaking-in should be charged. Section 248 is not concerned with actual forcing entry into a building. It is concerned with possession of an instrument fit for forcing entry into a building with intent to commit a serious offence inside the building. Possession of the instrument is comprehended as evidence of preparation to commit a crime inside the immovable property.

On general criminal law principles, mere preparation is not indictable on the ground that it is remote and does not unequivocally evince an intention on the part of the accused to commit an offence. But here the law considers the conduct of going equipped with housebreaking instrument as a 'dangerous preparation' for an eventual commission of an offence inside the building to be broken into. The possession of the equipment is considered preparatory to housebreaking with intent to commit a further offence inside. This inchoate conduct is deemed dangerous and, for that reason, penalised as an autonomous offence. However, it is important to observe that the section does not penalise the bare possession of housebreaking instrument; otherwise carpenters, electricians, plumbers and masons will all find themselves in jail, since the legitimate tools of their trade are capable of being used for housebreaking. What it penalises as 'dangerous preparation' is the possession of housebreaking instrument *accompanied by an intent* to commit an offence inside the house to be broken into. The prosecution must prove that specific intent as well, quite apart from the general criminal intent.

§2. Double inchoate crime: attempted abetment

The Penal Code introduces into the law the concept of double inchoate crime when it provides, laconically, in s. 97(2) that “attempted abetment shall be treated as abetment.” Attempt (s. 94) and instigation (s. 97(1)) are two distinct inchoate crimes. What s. 97(2) does is that it makes it an offence *to try to instigate* the commission of an offence. The more likely situation is where there is *instigation but it fails* in the sense that the person instigated refuses to give ear: the act instigated would have been an offence if it had been committed, but it was not. The law ordains that this is a situation of attempted abetment. In the same way as an attempted offence is treated as the offence committed, so attempted abetment is equivalent to abetment.

Section 97(2) contemplates the situation where D1 instigates or orders or counsels D2 to commit an offence but D2 does not give ear or he does nothing. It might be thought that this is simply a case of abetment or incitement. But abetment under the section means ordering, causing, aiding, or facilitating the commission of an offence by another. It follows that for D1 to be properly convicted of abetment the substantive crime he is alleged to have abetted must have been committed (or at least there must have been some preparation for the commission of the offence) by the person instigated, D2. If no offence is committed then there is no crime which D1 can be said to have abetted. One does not abet an offence; one abets the commission of an offence. So if the offence is not committed then there is no abetment. Hence, if D1 incites D2 to kill V and D2 fails to do so, D1 is not guilty of abetment; there is no murder by D2 which D1 can be said to have abetted. But if Lady Macbeth incites Macbeth to murder King Duncan and Macbeth does so, Lady Macbeth is guilty of abetment, i.e. she is accessory to murder.

Consider the previous hypothetical where D1 instigates D2 to kill V and D2 fails to do so. Since the offence has not been committed D1 is not guilty of abetment within the meaning of section 97(1). But D1 can be convicted under section 97(2) of attempted abetment, the crime of abetment having failed by reason independent of the will of D1.

The following situations may thus be noted: (i) If D1 instigates D2 to commit an offence and D2 commits it, D1 will be guilty of abetment and D2 of committing the substantive offence; (ii) If D1 instigates D2 to commit an offence and D2 refuses to commit or refrains from committing the offence, D1 is guilty of attempted abetment and D2 of no offence at all; (iii) If D1 instigates D2 to commit an offence and D2 does not succeed in his efforts to commit the offence, D1 will be convicted of attempted abetment and D2 of attempt; (iv) If D1 agrees with D2 that an offence should be committed (even if the offence is to be committed by only one of them) then both may be

charged with conspiracy; (v) If D1 instigates D2 to commit an offence and D2 gives ear and assents to the plan proposed, D1 and D2 become conspirators. The Penal Code knows of no offence of conspiracy to abet the commission of an offence. The reason is that for conspiracy to lie, what the conspirators agree on, if carried out, must involve the commission of an offence. Where the conspirators simply conspire to abet the commission of an offence, there is no guarantee that the person abetted would in fact commit any offence. In *Kenning & Others*⁴⁰ two men owned a shop selling hydroponic equipment, cannabis seeds and cannabis-related literature. Their conviction of conspiracy to aid and abet the production of cannabis was quashed by the Court of Appeal.

Sometimes the law punishes abetment as an autonomous offence. Thus, it is an offence under section 183(2) for anyone to *instigate* the public to refuse the payment of any tax. An appeal to the public not to pay tax amounts to instigation whether or not the appeal is heeded. And it matters not how the appeal is made, whether by way of political activism, through the media, through handbills, or through speeches; provided always that the appeal is addressed to the public rather than to a specific target group (say, unionised workers in a particular industry or an identified section of the community). It is also an offence under the same subsection for anyone to *instigate* the public to delay the payment of any tax. Payment is delayed when it is made after the expiry of the period during which it is due or after the extension period for payment, if any.

Other instances of abetment punished as an autonomous offence include: habitually furnishing places of refuge or assembly to malefactors⁴¹, accessory after the fact by shelter⁴², instigating a foreign power to undertake hostilities against the state⁴³, instigating or encouraging the gathering of insurgents during an insurrection⁴⁴, failure by a public servant to prevent the use of force against or the deprivation of liberty of or obstruction of the exercise of civic rights by another⁴⁵, delivery of arm or ammunition to a person without ascertaining that he is licensed to keep it⁴⁶, aiding or facilitating another person's prostitution⁴⁷, and receiving⁴⁸.

⁴⁰ [2008] 3 WLR 1306.

⁴¹ Section 99 (2).

⁴² Section 194.

⁴³ Section 103 (a).

⁴⁴ Section 116 (a).

⁴⁵ Section 146.

⁴⁶ Section 237 (3).

⁴⁷ Section 294 (1).

⁴⁸ Section 324.

Corporate, Vicarious and Strict Liability

Criminal responsibility for most crimes arises when the person does the physical element of the offence with the requisite mental element. Exceptionally, however, there are many crimes in respect of which the commission of the physical element of the offence alone is enough to attract criminal liability. This arises in three situations, namely, corporate liability, vicarious liability, and strict liability.

Normally, the construction of the provision of a given statutory offence would indicate whether the mental element is required or not for that particular offence. In that exercise, the language of the statute as a whole may have to be considered. Further, attention may be paid to the legislative history of the statute as well as to previous statutes similar to the one at hand. There would then be discovered Parliament's intention regarding the requirement or not of the mental element of the statutory offence under consideration. Although as a rule the mental element is required for a criminal offence, this rule may be displaced either by the words of the statute creating the offence or by the subject matter with which it deals. The words of the relevant statute and the subject matter that is the concern of the statute must therefore be considered. In the English case of *Warner v. Metropolitan Police Commissioner*¹, a man was charged with being in possession of tablets contrary to the Drugs Act 1964. The tablets were in a parcel which the man said he believed to contain scent. Held, by the House of Lords that the offence was 'absolute' and so *mens rea* was not necessary.

Section 1. Corporate criminal liability

A corporation is a creation of law and not of God. It is a legal person, an artificial person. Unlike a natural person, it has no physical existence; it is an intangible person and as such has no body that can be touched, no heart or mind, and cannot drink or eat. A corporation, it has been said, has no body to be kicked, no conscience, and no soul to be damned. Over a century ago in

¹ [1969] 2 AC 256

England, *Salomon v Salomon & Co Ltd*² established that on incorporation a company acquires a separate legal personality from its members.³

§1. Historical

It seems that in Europe as far back as the Middle Ages an association could be held guilty of an offence. But by the 18th century views had changed and it became the rule that an artificial person could not be made criminally liable. The basic argument was that a corporation has no physical existence and cannot therefore act or form an intention of any kind except through its organs. It was further argued that the stigma of guilt could only be raised against responsible individuals. A corporation has no mind, no conscience, and no feelings and consequently can have no contrition. Penalties intended for individuals are inappropriate for corporations. A corporation can neither be imprisoned nor executed and it cannot possibly commit offences such as perjury, bigamy, murder, incest and rape. Since it has no physical existence a corporation cannot appear in court, enter the dock and plead. Being a creature of the law a corporation can only do such acts as it is legally empowered to do; as a result any crime by the corporation is necessarily *ultra vires*. These arguments informed the view that a corporation could not be held criminally liable.

But they soon became less compelling. The proliferation of corporations led to a change of attitude once again. In company law the theory of 'lifting the veil of incorporation' became established. That theory enabled courts, particularly in matters of fraud and taxation, to pierce through the fiction of incorporation and to take account of the reality of the natural persons shielding behind the cloak of incorporation. The current legal position reveals an apparent cleavage between common and civil law jurisdictions. Corporate criminal liability is readily admitted in common law jurisdictions while civil law jurisdictions still persevere in their refusal to recognise liability to punishment of corporations. In those countries doctrinal writers persist that a corporation *qua* corporation cannot in principle be guilty of an offence. In practice, however, legal, criminological, and policy considerations have prompted courts in civil law jurisdictions to hold, by way of an exception, that a corporation can indeed be held criminally liable.

² [1897] AC 22.

³ Employees of a corporation cannot therefore shelter behind the corporation and may be successfully prosecuted for criminal acts performed or authorised by them.

§2. Extent of corporate criminal liability generally

A corporation⁴ may be criminally liable to the same extent as a natural person⁵, except in the case of offences which from their very nature cannot be committed by a corporation as a principal⁶ such as rape, bigamy, incest, and perjury, and those in which the only prescribed form of punishment the court can impose is physical such as a custodial sentence without any option or alternative of a fine. The notion of a company being capable of committing an offence developed rather slowly partly because of the artificiality of the corporation and partly because of the traditional requirement of proof of the mental element in crime. But the concept of corporate criminal liability is now well entrenched⁷ and it seems settled that a corporation may be liable on the basis of any of the following principles: (i) the principle of *identification*, under which a corporation may be criminally liable as a perpetrator or as an accomplice where one or more senior members of the management of a company are identified as the directing mind and will of the company, so that their intent is deemed to be the intent of the company⁸; (ii) the principle of *vicariously liability*, under which a corporation may be held criminally liable for the acts of its employees and others in the same way as an individual may be held vicariously liable except that if the prescribed act can only be performed by a natural person, a corporation cannot be vicariously liable for it whereas an

⁴ A corporation includes a limited company, a public corporation and local authorities.

⁵ In a statute therefore, unless the contrary intention appears, 'person' includes a corporation.

⁶ In *Robert Millar (Contractors) Ltd* [1971] 1 All ER 577 the managing director of a company sent a lorry on a long journey, knowing that it had a seriously defective tyre. The tyre burst and the lorry crashed causing six deaths. The driver was convicted, as principal, of six offences of causing death by dangerous driving. The managing director and the company were convicted, as secondary parties, of counselling and procuring those offences.

⁷ However, a number of intellectual arguments have been advanced against corporate criminal liability. It is argued that imputing on a corporation the mind or minds of its controlling officers is artificial. This argument is neutralised by the fact that most people accept the concept of corporate personality. Acceptance of that concept entails acceptance of its full implications. It is further said that it is absurd to impose fines which are trifling when compared with the profits or losses of the body concerned. The fine imposed always follows a conviction and need not be trifling and is not always trifling. The conviction of a corporation may reflect negatively on it. Adverse publicity following the conviction of a corporation may have a strong deterrent effect. Perhaps the strongest argument against corporate criminal liability is that it is unjust to penalise shareholders, consumers or taxpayers who ultimately bear the burden of fines imposed on corporations for acts or omissions of which usually they are unaware. The counter argument is that where a corporation has benefited financially from the criminal conduct, the imposition of a fine on the corporation is a means of depriving it, at least in part, of unjust enrichment.

⁸ It is a credible defence for a corporation to show that it exercised all due diligence and that the commission of the offence was due to the act or default of another person (i.e. a person other than the officer(s) identified with the corporation).

individual can; and (iii) the principle of *breach of statutory duty*, under which it is not necessary to find an act or omission by an employee which is imputable to the corporation.

Unlike principles (ii) and (iii) which are creatures of statute and statutory construction, the principle of identification is a judicial creation. The principle depends on the fiction that the acts (or omissions) and state of mind of certain superior officers (“controlling officers”) who compose the very personality of the organisation are the acts and state of mind of the corporation.⁹ In such a case, liability is not vicarious. The corporation is not held responsible on the basis of liability for the acts of its agents. The corporation is regarded as having committed the offence personally. In *Tesco Supermarkets Ltd v Natrass*¹⁰ Lord Reid said:

“A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one and the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company, or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then the guilt is the guilt of the company.”

The principle of identification can only operate if there is a sufficient act (or omission) with sufficient mental element on the part of an individual controlling officer to render that officer criminally liable. In *H L Bolton (Engineering) Co Ltd v P J Graham & Sons Ltd*¹¹, Lord Denning addressed the question of who can be identified with the corporation by pointing out that:

⁹ In *DPP v Kent and Sussex Contractors Ltd* (1944) KB 146 the intent of the transport manager of the company to deceive was held to be the intent of the company. In *ICR Haulage Ltd* [1944] KB 551 the act and intent of the managing director were held to be the act and intent of the company which was then convicted of conspiracy to defraud. In *Moore v I Bresler Ltd* [1944] 2 All ER 515 false returns with intent to deceive were made by the company secretary and a branch sales manager. The company was convicted of making the false returns with intent to deceive.

¹⁰ [1971] 2 All ER 127.

¹¹ [1956] 3 All ER 624.

“A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and acts in accordance with the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.”

The corporation may thus be identified with a manager to whom the directors have delegated full powers in the running of its affairs¹² or part of its affairs¹³. For example, the traffic manager of a company has been identified with it in relation to the operation of its fleet of goods vehicles¹⁴; but a corporation has not been identified with the branch manager of a company with a large number of branches¹⁵, nor with a depot engineer¹⁶, nor with the operator of a weighbridge belonging to the corporation¹⁷. The question of identification does not depend on the title of the person's post but on whether or not the person is part of the directing mind and will of the company. And whether a person is part of the directing mind and will of the company depends on its constitution and organisational structure. A person identified with the company renders it liable only so long as he acts within the scope of his office. He does not act within the scope of his office if he is on a frolic of his own or if he acts with the intention of doing harm or concealing harm to the corporation.

§3. Extent of corporate criminal liability under the Penal Code

There is no special provision in the Penal Code dealing explicitly with the criminal liability of corporations. The Code neither admits nor rejects the criminal liability of a corporation. The exact extent of corporate criminal liability in this country is thus a matter of some doubt, given that the nature of the general principle of corporate liability is nowhere articulated in the Code. One is tempted to take the Code's advertent or inadvertent silence on this matter as meaning that in this country a corporation is not criminally

¹² *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

¹³ *Worthy v Gordon Plant (Services) Ltd* [1985] CLY 624.

¹⁴ *Worthy v Gordon Plant (Services) Ltd* [1985] CLY 624; *Redbead Freight Ltd v Shulman* [1989] RTR 1.

¹⁵ *Tesco Supermarkets*.

¹⁶ *Magna Plant Ltd v Mitchell* [1966] Crim LR 394.

¹⁷ *John Henshall (Quarries) Ltd v Harvey* [1965] 1 All ER 725.

responsible. It is the directors and managers of corporations who are held criminally liable as can be seen from the language of sections 313 and 334 of the Code.

This notwithstanding, the point should not be missed that a corporation may be made criminally liable by the express wording of a particular piece of legislation. Furthermore, there is no special legal reason why in principle a corporation may not be convicted under the Code. The vast majority of offences in the Code begin with the words ‘any person’ or ‘whoever’. The Code has no definition section. But it is possible to read ‘corporation’ or ‘company’ or ‘association’ into those words except where there is something in the definition or context of the offence concerned that ousts such reading-in or that makes such reading-in repugnant. Section 261, for example, directs attention to “*whoever by his operations*”. Apparently this would seem to imply that the offence envisages only natural persons. In reality, there is no compelling reason why the section should be interpreted as capable of catching only the polluter who is a natural person. Major polluters are industrial corporations. A corporate polluter may thus be convicted under this section. It is now settled law that a corporation may be held guilty of a crime. The penalty clause provides for the alternative penalty of a fine, and this penalty can be imposed on a corporation.

§4. Theoretical bases and justification of corporate criminal liability

Where corporate criminal liability is readily admitted the basis for doing so is usually one or more of the following grounds: *respondeat superior* (vicarious liability), the ego theory, and public policy considerations.

Respondeat superior. Whenever the criminal liability of corporations has been admitted, the first theory often invoked for the statutory imposition of such liability is the principle of ‘vicarious liability’ under which the law recognises situations where one person may be liable for offences committed by another. Corporations may thus be held vicariously liable for acts of their employees in the same way as a natural person may be liable for his employee or agent. The corporation is held liable on the footing *respondeat superior* (meaning, ‘let the master answer’ for the wrongful acts of his servant or agent). The reasoning is that as each responsible officer of the corporation is also a natural person quite distinct from the corporation, it follows that a corporation’s legal liabilities are in a sense vicarious. The corporation is held liable for the acts of its directors or managers. This is particularly so where a corporation is in breach of a statutory duty or where statute expressly imposes vicarious liability. In some jurisdictions, liability is imposed on a corporation as

a collateral consequence if a legally representative organ of a corporation (such as the board of directors) or a member of such an organ (e.g. managing director) has committed a punishable offence or an illegality through which the obligations of the corporation have been improperly performed or the corporation has been enriched or is believed to have been enriched.

It is possible that the vicarious liability of corporations is not co-extensive with the vicarious liability of individuals. At least in England, a corporation has been held vicariously liable for conspiracy to defraud even though a natural person cannot be vicariously held liable for conspiracy. Furthermore, it has been judicially suggested that a corporation could be guilty of abetting an offence through its responsible officers, whereas, as regards individuals, there is no vicarious liability in abetting. It would therefore seem, although the law is yet to speak conclusively on this point, that the vicarious liability of corporations is wider than the vicarious liability of individuals.

Alter ego. Since a corporation has no physical existence it necessarily acts through physical persons. Its brain and nerve centre, its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. The fault of the corporation is therefore the fault of somebody who is not merely a servant or agent for whom the corporation is liable upon the footing *respondeat superior*, but somebody for whom the corporation is liable because his action is the very action of the corporation itself. The person who acts is not speaking or acting for the corporation. He is acting as the corporation and his mind which directs his acts is the mind of the corporation. Here there is no question of the corporation being vicariously liable. The person acting is not acting as a servant, a representative, an agent or a delegate. He is an embodiment of the corporation. He hears and speaks through the *persona* of the corporation. He is not the '*alter*' of the corporation. He is identified with the corporation. When dealing with an individual no other individual can be his *alter ego* ('second self'). He is the very ego of the corporation, so that his guilty mind is the guilty mind of the corporation.

But the ego theory is a mere fiction, a kind of jurisprudential esotericism. It seems that where the courts cannot hold a corporation vicariously liable and yet are unable to say it is irresponsible, they have recourse to the ego theory. Sometimes a corporation is directly designated (and not its directors) as the offender and held liable. Sometimes also, the corporation *qua* corporation is held liable if no definite person can be convicted because of the offence.

Policy. Courts sometimes hold a corporation criminally liable not on the footing of either vicarious liability or the ego theory but simply for policy considerations. This often happens where a statute has imposed a duty upon the corporation to act and it has failed to act; it is in breach of its statutory duty. Generally, a corporation will be held liable on grounds of policy considerations on one of two reasons: the difficulty of establishing the criminal responsibility of a corporation's administrations, and the important question of solvency. So, where the liability of the individual cannot be located or where the individual cannot be properly held liable, the corporation itself is held responsible. Even when liability can be properly placed on an identifiable individual, it is still pragmatic prosecutorial/judicial policy to hold the corporation vicariously liable because the individual may be unable to pay the fine that should be imposed in the circumstances. He may be insolvent or impecunious. By placing the responsibility on the corporation *qua* corporation there is every certainty that a fine imposed is paid when such fine might be out of proportion for an individual to pay.

Justification. Critics of corporate criminal liability argue that imputing on a corporation the mind or minds of its controlling officers is simply artificial. But the very idea of corporate personality is itself an artificial construct and once that concept is accepted, it becomes unavoidable to accept its full implications. Critiques further argue that it is absurd to impose fines which are trifling when compared with the profits or losses of the company concerned. The fine that is imposed following a conviction need not be trifling and in any event there is the added 'sanction' of adverse publicity following the conviction of a corporation and which tends to have a strong deterrent effect. Perhaps the strongest argument against corporate criminal liability, as already pointed out, is that it is unjust to penalise shareholders, consumers or taxpayers who ultimately bear the burden of fines imposed on corporations for acts or omissions of which usually they are unaware. The counter argument is that where a corporation has benefited financially from the criminal conduct, the imposition of a fine on the corporation is a means of depriving it, at least in part, of unjust enrichment.

§5. Punishing the convicted corporate offender

When an offence is committed within a corporation or by a corporation an individual may be identified as the one personally responsible, prosecuted, convicted and sentenced. However, given the complex structure of many corporations and the difficulty in identifying the individual(s) directly concerned in the chain of activities which led to the commission of the

offence, the realistic option in many instances is to proceed against the corporation itself. The earlier procedural and substantive difficulties¹⁸ that were considered obstacles to the prosecution and punishment of a corporation are no longer valid.

Regarding sanctions against corporations, it is trite observation that a corporation can neither be executed nor arrested, detained, imprisoned. Moreover, certain goals which criminal justice seeks to achieve (such as retribution, expiation, intimidation, reformation and rehabilitation) cannot, in respect of corporations be attained. Again, other techniques such as the executive's exercise of the prerogative of mercy raise difficulties with regards to a corporation. However, a corporation can be 'executed', so to speak, by way of compulsory winding up (liquidation) or dissolution following a court order. But dissolution of a corporation is something to be deprecated because of the adverse social, political and economic consequences of such an extreme measure. Accessory penalties such as confiscation, fine, forfeiture and closure of the establishment (i.e. closure or shut down of the business) or an order in the nature of an injunction may be pronounced against a guilty corporation. But here too shutting down the business organisation or entity may not be advisable and, in the case of penalties such as confiscation and fine, it is ultimately the shareholders of the corporation who are collectively penalised.

Section 2. Vicarious criminal liability

§1. Silence of the Penal Code on the subject

The Penal Code is silent on the question of vicarious criminal responsibility. This does not mean that there are no instances of vicarious-liability offences in the Code.

“There are ... a number of statutory verbs used in creating some simple offences and that are capable of being construed vicariously. Some of these verbs are: ‘allow’, ‘cause or allow’, ‘cause’, ‘use’, ‘assume possession’ and ‘keep’. Even though each of these verbs may be read as a mental element word ... they are capable of being construed vicariously. Section R. 368(2) penalises “innkeepers and lodging-house keepers who *keep* their

¹⁸ The obstacles arose from the following arguments: the trial of a corporation was not feasible because personal appearance in court was required and the corporation being a mere juristic person cannot be personally present in court; the corporation has no body and no mind and so cannot act and cannot have a guilty mind; a corporation cannot commit a crime since it cannot authorise it, and doing so will be acting *ultra vires*; a corporation having no body cannot be subjected to bodily punishment since that is essentially the only available and effective means of punishment.

arrival and departure register in an incomplete manner or who do not present it at the times prescribed by the regulations or when they are required so to do by the competent authorities.” Suppose that the keeper of such a place has installed a manager who deliberately keeps the register in an incomplete manner or does not present the register as and when required. The manager is the real offender. But, paradoxically, it is impossible to convict him because the provision strikes only at the keeper (of an inn or lodging-house). The general tendency, in public welfare offences, is to interpret a statutory verb in such an extensive sense as to embrace say employers, owners, masters and other persons responsible in law. Thus a person may be held to ‘cause’ a result by employing or delegating or entrusting someone who causes it. Supposing that D asks F to exercise his German shepherd in his yard and in the course of doing so the dog breaks loose from the leash and eats up E’s goat tethered and grazing nearby. D, and not F, would be liable under section R. 369(1) for causing the death of E’s animal. If P’s housekeeper lets P’s cat out of the house and it goes over the wall fence and eats up a rabbit belonging to P’s neighbour P can properly be convicted of causing the death of the rabbit. The words ‘use’, ‘allow’ and ‘possess’ have a similar effect. Thus, it is commonly said that a man uses his vehicle if his servant uses it on his business. Suppose that A goes into a butchery to buy meat, which is weighed using weights in the shop that are different from the prescribed ones. The owner of the butchery, and not the attendant, can be convicted under R. 3769(4) for ‘using’ those weights. Supposing again that an owner of cattle allows or instructs his servant to take them out to the fields to graze and the cattle damage farm crops on another’s land. Surely, the cattle owner would be liable as the offender.”¹⁹

Vicarious criminal liability may be imposed under offences created in particular statutes but this must be rare in this country. Where the legislative language of an offence does not clearly impose vicarious criminal liability it is doubtful that the courts would be prepared to show themselves ready to imply such liability. This part of the criminal law is very marginal in our legal system.²⁰ Nonetheless, at least a little need to be said about it since vicarious

¹⁹ Anyangwe C, *Criminal Law in Cameroon – Specific Offences*, Langaa, Bamenda, 2011, pp.599-600.

²⁰ There are some offences in the Code under which a person can arguably be held vicariously liable. For example, the editor and publisher of a newspaper may be held vicariously liable for an article published in his newspaper that amounts to ‘contempt of public bodies and public servants’ under section 154, or to ‘contempt of race or religion’ under section 241, or to propagation of false news under sections 240, or to defamation under

criminal liability is a legal concept known to all legal systems and therefore some understanding of it is called for.

§2. Concept of vicarious liability

Vicarious liability is liability which falls on one person as a result of an action by another. It is the legal responsibility of one person for the wrongful acts of another. This responsibility is exceptional because, like it has been said, *qui peccat per alium peccat per se*²¹ is not a maxim of criminal law. The general rule of criminal law is that a criminal act is primarily the responsibility of the immediate actor. A person is not accountable for the acts of another person which he has not authorised and of which he was ignorant.²² This is an elementary principle both of justice and of utility.

Exceptionally, however, a person can be vicariously liable criminally for the acts of others which he has not authorised or which he has not deliberately failed to prevent and of which he was ignorant. The liability arises only if the other person (employee or delegate) was acting within the scope of his employment or authority. Doing an authorised activity in an unauthorised way falls within such scope, but a wholly unauthorised activity does not. In one case, a messenger boy who had no authority to sell anything at all supplied intoxicants outside permitted hours. The accused licensee was acquitted of supplying the intoxicants.²³

§3. Legislative language imposing vicarious liability

Statutory vicarious liability²⁴ normally results from the express wording of a statute and is based on the notion that the act of the servant is his master's act in law. A master is thus liable for the acts of his servant, even for those acts

section 305. A licensee may also be held vicariously liable under section 243(1)(b) if his bartender supplies liquor to a person manifestly drunk.

²¹ A like Latin phrase is, *qui facit per alium facit per se*, meaning 'who does something through another does it himself (is himself seen to do it)'.

²² In *Huggins* (1730) 1 Barn KB 358 the warden of a prison was acquitted on charge of murdering one of the inmates. The prisoner's death had been caused by another man, a servant (employee) of the warden. The servant had confined the inmate in an unhealthy cell without any direction from the warden and without his knowledge. It was held that the guilty party was the servant and not the warden because the acts in question had been committed without the warden's knowledge.

²³ *Adams v Camfoni* [1929] 1 KB 95; *Baker v Levison* [1950] 2 All ER 829.

²⁴ In England, vicarious liability may arise not only under statute. It may also arise under the common law. An employer is vicariously criminally liable for a public nuisance committed on his property or on the highway by his employee, even if the employee was disobeying orders: *Stephens* (1866) LR 1QB 702. An employer is also vicariously criminally liable for libels published by his employee unless he proves that he did not authorise the publication and that the publication was not due to want of care on his part.

that were expressly forbidden. In *Moussel Bros v. London & North Western Railway Co Ltd*²⁵, X was convicted of the offence of having given a false account of goods to be carried by the railway, so as to avoid payment of the appropriate tolls. It was found that the false account had been given by a servant of X, on the instructions of X's manager, with the intention of avoiding payment of the tolls.

§4. Liability based on principles of 'extensive construction' and 'delegation'

Where the legislative language of an offence does not clearly impose vicarious liability the courts may imply such liability based on the principle of 'extensive construction' of certain verbs, and the principle of 'delegation'.

Extensive construction. Verbs such as 'sell' or 'use' appearing in statutory offences are likely to be given an extended construction. The judicial interpretation of such verbs results in taking the act of an employee as the act of the employer and therefore holding the employer as having committed the act physically performed by his employee.²⁶

²⁵ [1917] 2 KB 836.

²⁶ The following English cases illustrate some application of the extensive construction principle. An employer, as well as a driver, has been held guilty of '**using**' a motor vehicle with a defective brake: *Green v Burnett* [1954] 3 All ER 273; *Mickleborough v BRS Contracts Ltd* [1977] RTR 389; an employer has been held guilty of 'exposing for **sale**' bags of coal containing short weight, although the short weight was due to the wrongdoing of the employee who exposed them for sale: *Winter v. Hinckley and District Co-operative Society Ltd* [1959] 1 All ER 403; an owner of a number of shops in one of which an assistant, contrary to instructions, sold an American ham as a 'Scotch ham', was held guilty of **selling** goods to which a false trade description had been applied: *Coppen v Moore (No 2)* [1898] 2 QB 306; and in another case, all 11 members of the governing committee of an unincorporated social club were held vicariously liable for illegal **sales** of intoxicating liquor, unknown to them and contrary to their instructions, by their bar staff, since the staff were the employees of the committee. The extensive construction principle has also been used to impose vicarious liability on a **principal** for the act of his agent or for the act of an independent contractor acting under the instructions and controls of the principal: *Quality Dairies (York) Ltd v Pedley* [1952] 1 All ER 380; *FE Charman Ltd v Clow* [1974] 3 All ER 371; *Hallett Silbermann Ltd v Cheshire CC* [1993] RTR 32; on a **partner** for the act of a fellow partner: *Clode v Barnes* [1974] 1 All ER 1166; contrast *Bennett v Richardson* [1980] RTR 358; and on a **licensee** for illegal sales by bar staff who are not his employees, but like him (the licensee) employed by the owner of the premises, since the act of selling can only be performed by virtue of the licence: *Goodfellow v Johnson* [1965] 1 All ER 941. On the other hand, members of a board of directors of a body corporate are not vicariously liable for the acts of an employee of the body corporate. Where a strict liability offence requires *mens rea* as to some of its elements, the employer must have *mens rea* as to those elements before the employer can be vicariously liable for the offence under the extensive construction principle.

Delegation. In terms of the principle of delegation, where a licensee delegates his responsibilities as a licensee to another and the delegate acts in breach of one of the delegated responsibilities, his acts and state of mind are imputed to the delegator. In *Allen v Whitehead*²⁷, the keeper (licensee) of a refreshment house delegated control of it to his manager who, in the keeper's absence and contrary to his express instructions, allowed prostitutes to enter on the premises. The keeper was convicted of "knowingly suffering prostitutes to meet together in his house and remain therein." The acts and state of mind of the delegate (the manager) were imputed to the delegator. In another case, one co-licensee was held vicariously liable where his co-licensee, to whom he had delegated the management of a refreshment house owned by their employer, had knowingly permitted disorderly conduct there: *Linnett v Metropolitan Police Comr*²⁸. The delegator is liable only where there is a complete delegation of his managerial functions and responsibilities. In *Vane v Yiannopoulos*²⁹ a restaurateur was permitted to sell intoxicants only to customers consuming a meal. He told a waitress to sell liquor only to customers buying a meal. He then retired to a room in the basement of the restaurant. He was held not guilty of any infringement by the waitress since he had retained control of the restaurant and had not delegated the complete control of the restaurant to her.

§5. Recourse to concept of vicarious liability

Recourse to the concept of vicarious liability is thought to be essential to the enforcement of modern regulatory legislation governing such matters as the sale of food, drugs or intoxicating liquor. Some offences in this area can be committed only by a particular person, such as a licensee, and without vicarious liability such offences would be rendered nugatory where that person acted through others. Courts take the view that recourse to the legal concept of vicarious liability is the most effective way of enforcing such regulatory legislation. They therefore impose on the employer liability for contravention by employees in order to encourage him to prevent them infringing the legislation. This justification assumes that the imposition of vicarious liability is the most effective method of securing compliance with the statute. Some would argue that this is unproved.

²⁷ [1930] 1 KB 211.

²⁸ [1947] 1 All ER 380.

²⁹ [1964] 3 All ER 820.

Section 3. Strict Liability

In England, a man by the name Woodrow was convicted in 1846 of having in his possession adulterated tobacco, even though he did not know that it was adulterated. The case is reported as *Woodrow*³⁰. It appears to have been the first reported case on the law of strict liability in the criminal law of England. The concept of strict liability, like other English legal concepts, was ‘received’ into the law of British colonial territories. Today, virtually all strict liability offences in England are the creation of Parliament. But until a few years back there were still a few common law strict liability offences. For example, in *Gibson and Sylverie*³¹, outraging public decency was held to be an offence of strict liability. In that case the court ruled that it did not have to be proved that the defendant intended or was reckless that his conduct would have the effect of outraging public decency.

Similarly, in *Lemon and Whitehouse & Gay News*³² the offence of blasphemous libel³³ was held to be one of strict liability. In that case a poem had been published in *Gay News* describing homosexual acts done to the body of Christ after his crucifixion and also describing his alleged homosexual practices during his lifetime. The editors and publishers were convicted of blasphemy. On their appeal to the House of Lords, the Law Lords held that it was not necessary to prove that the defendants intended to blaspheme. Lord Russell supplied the following reason for the decision of the House:

“Why then should the House, faced with a deliberate publication of that which a jury with every justification has held to be a blasphemous libel, consider that it should be for the prosecution to prove, presumably beyond reasonable doubt, that the accused recognised and intended it to be such. ... The reason why the law considers that the publication of a blasphemous libel is an offence is that the law considers that such publication should not take place. And if it takes place, and the publication is deliberate, I see no justification for holding that there is no offence when the publisher is incapable, for some reason particular to himself, of agreeing with a jury on the true nature of the publication.”

³⁰ (1846) 15 M & W 404.

³¹ [1991] 1 All ER 439.

³² [1979] 1 All ER 898.

³³ The offence has since been abolished by the Criminal Justice and Immigration Act 2008.

In strict liability cases, the lawmaker simply wants certain things done or not done because it believes that the doing or the not doing of those things will ensure some social advantage and not because it thinks the conduct involved is wrongful in itself.

§1. Concept of strict liability

An offence is one of strict liability where there may be no criminal responsibility (blameworthiness) on the part of the defendant in the sense that he does not intentionally act and does not intentionally cause the result which completes the offence. Liability arises by the mere fact that the defendant voluntarily did the relevant physical act. In *Woodrow* the defendant was held guilty simply because he was in possession of the foul object (the adulterated tobacco), conduct which was a prohibited act. In the comparatively more recent case of *Pharmaceutical Society of Great Britain v Storkwain Ltd*³⁴ a pharmacist was held to be guilty simply because he supplied drugs without a prescription given by an appropriate medical practitioner, meaning that the pharmacist supplied drugs without a genuine prescription. He had supplied drugs on prescriptions which were later found to be forged. There was no finding that the pharmacist had acted dishonestly, improperly or even negligently. The forgery was sufficient to deceive the pharmacists. He was convicted under the Medicines Act 1968 which provides that no person shall supply specified medicinal products except in accordance with a prescription given by an appropriate medical practitioner.

Strict liability and absolute liability are not the same concepts. In strict liability it must be shown that the doing of the physical act by the defendant was voluntary.³⁵ By contrast, in absolute liability the defendant may be found guilty even though he did not do the physical act voluntarily. Absolute liability means that no mental element at all is required for the offence.³⁶ It generally

³⁴ [1986] 2 All ER 635.

³⁵ However, a defendant may be convicted if his voluntary act inadvertently caused a prohibited consequence as in *Callow v Tillstone* [1900] 83 LT 411 where the defendant, a butcher, was convicted of exposing unsound meat for sale even though he had taken reasonable care not to commit the offence. He had asked a vet to examine the carcass to see if it was fit for human consumption and the vet had assured him that it was alright to eat. Similarly, in *Harrow LBC v Shah and Shah* [1999] 3 All ER 302, two men were charged with and convicted of selling a lottery ticket to a person under 16 even though they had taken all reasonable steps to prevent the offence, the court holding the offence was one of strict liability.

³⁶ A person may be successfully prosecuted for driving without a licence even though he may not have acted intentionally. In *Strouger v. John* [1974] Crim LR 123 a driver was convicted under the Vehicles (Excise) Act 1971 for failing to display excise licence on his car

arises in status offences. Status offences are those where the physical element is a state of affairs. The defendant is liable because he has 'been found' in a certain situation. In *Larsonneur*³⁷ the defendant was an alien who, having been ordered to leave the UK decided to go to Eire (Ireland). The Irish police deported and took her in police custody back to the UK, where she was put in a cell in a police station. Her act in returning was not voluntary as she did not want to return to the UK and had no *mens rea*. Despite this, she was found guilty under the Aliens Order 1920 of "being an alien to whom leave to land in the United Kingdom" having been refused was "found in the United Kingdom". In *Winzar v Chief Constable of Kent*³⁸, a man was taken to the hospital in a stretcher, but when he was examined by doctors they found that he was not ill but drunk. He was told to leave the hospital, but was later found slumped on a seat in a corridor. The police were called and they took him to the roadway outside the hospital. They formed the opinion he was drunk so they put him in the police car, drove him to the police station and charged him with being found drunk in a highway contrary to the Licensing Act 1872. His conviction was held on appeal. Goff LJ justified the conviction in these terms:

"[L]ooking at the purpose of this particular offence, it is designed ... to deal with the nuisance which can be caused by persons who are drunk in a public place. This kind of offence is caused quite simply when a person is found drunk in a public place or highway ... [A]n example ... illustrates how sensible that conclusion is. Suppose a person was found drunk in a restaurant and was asked to leave. If he was asked to leave he would walk out of the door of the restaurant and would be in a public place or in a highway of his own volition. He would be there of his own volition because he had responded to a request. However, if a man in a restaurant made a thorough nuisance of himself, was asked to leave, objected and was ejected, in those circumstances he would not be in a public place of his own volition because he would have been put there. .. It would be nonsense if one were to say that the man who responded to the plea to leave could be said to be found drunk in a public place or in a highway,

windscreen, the court holding the offence was an absolute one dispensing with the need for proof of *mens rea*.

³⁷ [1933] 24 Cr App R 74. The decision in this case was much criticised as unjust on the grounds that the defendant was in effect confronted with a Hobbsian choice: had the woman refused to go along with the police she would have been guilty of resisting the police in the discharge of their duties; by going along with the police who escorted her from Ireland and delivered her to the custody of the English police she was guilty of being found in the UK where she had been refused leave to land. Either way she was bound to commit an offence.

³⁸ (1983), *The Times*, 28th March 1983.

whereas the man who had been compelled to leave could not. This leads me to the conclusion that a person is “found to be drunk or in a public place or in a highway”, within the meaning of those words as used in the section, when he is perceived to be drunk in a public place. It is enough for the commission of the offence (1) if a person is in a public place or a highway, (2) he is drunk, and (3) in those circumstances he is perceived to be there and to be drunk.”

§2. Strict liability an anomaly in criminal law

The concept of strict liability is an anomalous one in criminal law because it goes against the general principle enunciated in section 72(2) of the Penal Code that “criminal responsibility shall lie on him who intentionally commits each of the ingredient acts or omissions of an offence with the intention of causing the result which completes it.” Like Lord Reid said in *Sweet v Parsley*³⁹,

“There has for century been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. ... [I]t is firmly established by a host of authorities that *mens rea* is an ingredient of every offence unless some reason can be found for holding that it is not necessary.”

In that case Miss Sweet, a tenant of a farmhouse, ceased to dwell there and let rooms in it to sub-tenants and only visited the house occasionally to collect letters and receive rents. She was charged with being concerned in the management of premises used for smoking cannabis. It was held that she was not guilty.

In offences of strict liability the mental element is not required for at least one part of the physical element of the offence⁴⁰ and in some cases it is altogether specifically excluded by the relevant criminal provision.⁴¹

³⁹ [1969] 1 All ER 347.

⁴⁰ In *Prince* (1875) LR 2 CCR 154 the defendant took an unmarried girl under the age of 16 out of the possession of her father against his will, contrary to the Offences against the Person Act 1861. He knew that the girl he took was in the possession of her father but believed, on reasonable grounds, that she was aged 18. He was convicted as he had the intention to remove the girl from the possession of her father. With regard to the girl's age the court held that knowledge of her age was not necessary as there was strict liability on this aspect of the offence. In *Hibbert* (1869) LR 1 CCR 184, the defendant met a girl aged 14 on the street. He took her to another place where they had sexual intercourse. He was acquitted of the offence of taking an unmarried girl under the age of 16 out of the possession of her father. It was not proved that he knew the girl was in the custody of her father. The age aspect

§3. Strict liability arises mostly in cases of summary offences

Strict liability offences are regarded as not criminal in any real sense, but as acts which in the public interest are prohibited under penalty. Most cases of strict liability offences are summary offences denoted in the Penal Code as ‘simple offences’. Section 74(4) of the Code dispenses with the requirement of intention for the commission of simple offences. It provides that “responsibility for a simple offence shall not require any intention to act or to omit or to cause the result.” Simple offences might be thought to be strict liability offences since they dispense with the need for proof of mental element and since their prescribed punishment is always a token penalty.

It seems then that the court in this country does not, like the court in England, face the daunting task of having to figure out whether a given offence is one of strict liability or not. Generally speaking, simple offences are strict liability offences and proof of mental element is not necessary. However, some simple offences require proof of some mental element.

“It is an over statement to say that simple offences in the Penal Code are all offences of strict liability. In some simple offences there is no express requirement of a mental element. There, it can be assumed that the lawmaker intended to create strict liability. But there a good number of other simple offences in respect of which, the lawmaker has inserted an express requirement of mental element, not being the requirement of intention. For, the specific mental element that is excluded by the proviso to section 74(4) is intention and not other mental states. In two instances under section R. 370 criminal liability would attach only where the simple offence was committed intentionally, the mental element being conveyed by the words ‘wilfully’ (section R. 370 (1)) and ‘knowingly’ (section R. 370 (9)) even though section 74 (4) says responsibility for a simple offence shall not require any intention. There are other cases in which some other mental element is expressly required. In those cases the mental state that must be proved in order for liability to attach is the element of fault on the part of the defendant. A variety of terms are used to denote this fault element: ‘fail’ (section R. 367(1)(3)(4)), ‘neglect’ (section R. 367(5)), ‘carelessly’ (section R. 367(10)), , ‘negligence or carelessness’ (section R.

of the offence was one of strict liability, but intention was required for the removal aspect of the offence and, in this case, it had not been proved.

⁴¹ Strict liability does not apply to inchoate offences or to accessoryship because to be guilty as attempter or accessory, the defendant must know the relevant facts.

368(8)), ‘careless or clumsy’ (section R. 369(2)), ‘clumsiness, negligence, carelessness or failure’ (section R. 370(4)).”⁴²

Further, there are probably a few serious offences that appear to be strict liability offences because they dispense with proof of mental element. Besides, a statutory duty of strict liability may consist of an omission to fulfil a duty imposed on the defendant, such as the duty on a motorist to have a spare tyre in his care, or the duty on a citizen to have his national identity card on him at all times when he leaves his home. In *The People v Tankendem André* (1982)⁴³ the defendant was charged with driving without a spare tyre, contrary to Rule 44(e) of the Road Traffic Regulations. He was convicted even though he showed that he had a tyre puncture, replaced it with the spare tyre he had and had left the punctured tyre to be mended. In another case, *The People v Mugri Ephraim* (1982)⁴⁴ the charge against the defendant was travelling without being in possession of a national identity card, contrary to section 2 of decree no. 67/DF/564 of 28 December 1967. He was also found guilty even though he adduced evidence to show that he was in the process of making one.

In cases of this nature the defendant is personally (as opposed to vicariously) liable for the offence as perpetrator if the duty imposed by law is not fulfilled. It is immaterial that the defendant instructed an employee or a subordinate of his to ensure that the duty was fulfilled: *Hodge v Higgins*⁴⁵.

§4. Criteria for determining strict liability offences

Not all of the criminal law is contained in the Penal Code. There are a great many specific offences that appear in particular legislative enactments. A statute in creating an offence may clearly indicate that the offence in question is one of strict liability. But more often than not a statute fails to give such a clear indication. It then falls upon the courts to determine whether a given offence is one of strict liability or not. Therefore, the issue whether a particular offence under any of the various particular pieces of legislation is one of strict liability or not may therefore still be very relevant. This is not always easy. In *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong*⁴⁶ the appellants had been charged with deviating from building work in a material way from the approved plan, contrary to the Hong Kong Building Ordinances. It was necessary to decide if it had been proved that they knew that their deviation

⁴² Anyangwe C, *Criminal Law – Specific Offences*, pp598-599.

⁴³ Charge No. MuM/194c/82, unreported.

⁴⁴ Charge No. BM/198c/82, unreported.

⁴⁵ [1980] 2 Lloyd’s Rep 589.

⁴⁶ [1984] 2 All ER 503.

was material or whether the offence was once of strict liability on this point. The Privy Council stated that the presumption of *mens rea* is required before a person can be held guilty of a criminal offence. This criterion was amplified by Lord Scarman as follows: (i) the presumption of *mens rea* required before a man can be convicted applies to statutory offences and can be displaced only if this is clearly or by necessary implication the effect of the statute; (ii) the presumption of *mens rea* is particularly strong where the offence is ‘truly criminal’ in character; (iii) the only situation in which the presumption of *mens rea* can be displaced is where the statute is concerned with an issue of social concern – public safety is such an issue; and (iv) even where the statute is concerned with an issue of social concern, the presumption of *mens rea* stands unless it can be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

Other suggested criteria for making the determination include the following: whether the offence requires a mental element – if it does not then it is a strict liability offence⁴⁷; what the language of the statute says – if a section has no words of intention or if the defences of due diligence and of mistake are ousted then the offence is one of strict liability⁴⁸; whether the offence is regulatory in nature⁴⁹; whether the offence is punishable by imprisonment – if it does then it may not be a strict liability offence; whether the strict liability offence is in breach of fundamental principles of justice and hence is incompatible with the right to a fair trial⁵⁰; whether the crime involves

⁴⁷ *Sweet v Parsley* [1969] 1 All ER 347; *B (a minor) v DPP* [2000] 1 All ER 833; *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong* [1984] 2 All ER 503.

⁴⁸ *Pharmaceutical Society of Great Britain v Storkwain Ltd* [1986] 2 All ER 635; *Sherras v De Rutzen* [1895] 1 QB 918; *Harrow LBC v Shah and Shah* [1999] 3 All ER 302; *Muhammad* [2002] EWCA Crim 1856. Generally speaking, to decide whether or not an offence is one of strict liability one may either look at the language of the statute or consider the *raison d'être* or broad social grounds or aims of the statute. The offence would be one of strict liability if the purpose of the legislation would be defeated by holding that it is necessary for the prosecution to prove the mental element. Causing a result through inanimate forces readily involves strict liability.

⁴⁹ In *Alphacell Ltd v Woodward* [1972] 2 All ER 475 a company was charged with causing polluted matter to enter a river when pumps which had been installed failed, and polluted effluent overflowed into a river. There was no evidence either that the company knew of the pollution or that it had been negligent. The House of Lords held the offence to be one of strict liability and the company found guilty.

⁵⁰ *K* [2001] 3 All ER 897: genuine mistake no defence to an offence of strict liability and that the offence was not incompatible with s. 6 of the European Convention on Human Rights; *Salabiaku v France* (1988) 13 EHRR 379; *DPP, ex parte Kebilene* [1999] 4 All ER 801; *G* [2008] UKHL 37: boy of 15 had sexual intercourse with a girl of 12 and was charged with rape of a child under 13 under the Sexual Offences Act. Held, that the offence was one of strict liability and not in breach of human rights.

issues of social concern⁵¹; and whether it would promote enforcement of the law by imposing strict liability⁵².

§5. *Raisons d'être* for strict liability offences

It is believed that the application of strict liability is essential to ensure respect for certain important regulations necessary for the welfare and protection of the community with respect to activities involving potential danger to public health, safety or morals. The high degree of potential social danger justifies the interpretation of an offence as one involving strict liability. It is also assumed that the imposition of strict liability promotes greater care over public health, safety and morals by encouraging higher standards in such matters as hygiene in processing and selling food, or obeying building or transport regulations. A failure to comply with high standards may cause risk to the life and health of large numbers of the general public. But some would argue that there is no evidence that strict liability improves standards by inducing business to take a higher standard of care. Moreover, it is pointed out, strict liability may even be counter-productive because if people realise that they could be prosecuted even though they have taken every possible care, they may be tempted not to take any precautions at all.

Another justification for strict liability offences relates to proof and court time. Strict liability offences dispense with the need to prove the mental element and so are easier to enforce. They save court time, as people are more likely to plead guilty. If proof of intention were required regarding this category of offences, such proof could prove very difficult in many summary offences. Strict liability facilitates the conviction of some people guilty of negligence who would otherwise escape for lack of proof. However, whereas strict liability exempts the prosecution from having to prove fault, it does not exempt from having to prove the specific act that was done in breach of the statute. Strict liability imposes guilt on people who are not blameworthy in any

⁵¹ *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong* [1984] 2 All ER 503; *Blake* [1997] 1 All ER 963: disc jockey convicted of using a station for wireless telegraphy without a licence.

⁵² *Lim Chin Aik v The Queen* [1963] AC 160; *B v DPP* [2000] 1 All ER 833: a boy aged 15 sat next to a girl aged 13 on a bus and asked her to give him a 'shiner', meaning by that to have oral sex with him; he believed she was over the age of 14. He was convicted of inciting a child under the age of 14 to commit an act of gross indecency; held, not a strict liability offence; In *K* [2001] 3 All ER 897 a 26-year-old man had consensual sexual activity with a 14-year-old girl honestly believing that she was 16 or over; held that an honest belief was a defence to the charge. In *Kumar* [2004] EWCA Crim 3207: a 34-year-old man picked up a 14-year-old boy at a recognised gay club the policy of which was to admit only those aged 18 or over. He had consensual sexual activity with the boy, including penetration of his anus, in his flat. Held, that an honest belief as to the age of the boy was a credible defence.

way and its imposition, where an offence is punishable by imprisonment, would probably be contrary to the principles of human rights. However, lack of blameworthiness can be taken into account when passing sentence.

§6. Relevant defences

In offences of strict liability it is not a defence to plead due diligence, that is, to show that the defendant has taken all possible care not to do the forbidden act or omission and that therefore there is no fault on his part. The defence of mistake is also not available in offences of strict liability.⁵³ However, relevant defences of general application are available.

Moreover, in some cases a statute imposing strict liability may also provide a defence, including a 'due diligence' defence and a defence of mistake. For example, under the English Food and Drugs Act 1955, a man may escape liability for its contravention if he is able to show that such contravention resulted from the act or default of a third party or that he acted with all due diligence in complying with the statute. Further, it is a defence under the Trade Description Act 1968 for a man to prove that the commission of the offence charged resulted from a mistake or from reliance on information supplied to him or from the act or default of another person; and that he exercised due diligence to avoid the commission of the offence by himself or any other person under his control.

⁵³ In *Cundy v Le Coq* (1884) 13 QBD 207 it was held that a *bona fide* mistake as to the condition of the person served liquor is no answer to a charge of selling intoxicating liquor to any drunken person, such a mistake being a matter only for mitigation of penalty. But in *Sherras v De Rutzen* [1895] 1 QB 918 the conviction of a publican for supplying liquor to a constable on duty in the mistaken belief that he was off duty was quashed because the offence was held not to be one of strict liability and, accordingly, a genuine mistake provided the defendant with a defence. The judge pointed out that if the offence was to be made one of strict liability then there was nothing the publican could do to prevent the commission of the crime. No care on the part of the publican could save him from a conviction, since it would be easy for the constable to deny that he was on duty when asked.

Rationales of Punishment

Punishment¹ in any criminal justice system is a natural response to offending. It is the infliction of consequences normally considered unpleasant on a person in response to his conviction for a crime. Being the single characteristic that differentiates criminal from civil law, punishment is dependent on what the courts inflicting it intend, rather than on what the person receiving it perceives. Thus, a sentence of imprisonment does not cease to be punishment merely because the convicted offender probably considers prison as a place where ‘accommodation’ and meals are guaranteed.

Sentences are communicative and have a significant psychological element. The punishment inflicted through sentence by the court forces the attention of the offender to the disapproval it conveys. It reinforces the values that it has been decided to protect through criminal law, presumptively brings the offender to repent of the wrongdoing by him, and provides a means for him to ‘work through’ and express penitence. Its purpose may often be to educate people out of a certain way of behaviour which is prevalent. The offender’s response to the sentence may thus be seen as a kind of apology to the community wronged by the offence.

Generally speaking, when it comes to punishing a convicted offender the criminal court applies its mind, as a matter of routine or purposely, to various theories of punishment in order to determine the appropriate sentence to pass. Determining the appropriate sentence involves a two-stage thought process. First, the criminal court has regard to the nature and gravity of the offence committed, the person and circumstances of the offender, and the interest of society. The peculiar facts of each individual case are taken into account so as to enable sentence to be adjusted to fit the particular combination of facts in each individual case. Second, the criminal court also has regard to the purpose of the sentence it is minded to impose, that is, the rationale of the punishment sought to be inflicted. It considers whether the intended sentence should serve the goal of retribution or that of crime prevention.

The Penal Code does not declare which of the several possible sentencing rationales canvassed by criminologists should be given priority in certain types

¹ Fitzgerald PJ, *Criminal Law and Punishment*, Oxford University Press, Oxford, 1962; Ralph CH, *Common Sense about Crime and Punishment*, New York, 1961.

of cases. In fact, the Code declares no sentencing rationale at all; at least not explicitly. The closest hint at sentencing rationales in the Code is what is contained in the brief and non-authoritative prefatory explanatory note to Part II of Book I of the Code. That Part is entitled ‘punishment and prevention’ and the prefatory comment states:

“This part deals with the weapons, whether punitive or defensive, which constitute the armoury of the criminal courts. The object ... is to ensure both the *correction of the offender* and the *protection of the public*. But public protection, to be effective, and particularly in the case of first offenders and young persons, even if not minor, demand a wide range of penalties and measures at the disposal of the courts, thus enabling them to *make the punishment fit not only the crime but also the criminal*, taking account of his chances of *reformation*, to avoid in many cases short prison sentences which almost always do more harm than good, to hold out to the offender the chance of *redeeming himself* by work and good behaviour (in society and not only in prison), and so to avoid so far as at all possible the risks of contamination, relapse and repetition producing persistent offenders who can be dealt with only by preventive confinement.” (Emphasis supplied)

This comment would seem to encapsulate the so-called ‘combination theory’ of punishment which embraces both the retributive and the preventive theories of punishment. It identifies three elements as the basic principles underlying sentencing: punishment has to fit the *crime*; punishment has to be geared towards correction and reformation of the *offender*; punishment has to aim at *public* protection. The intention of the drafters of the Code appears to ensure that sentencing is not dealt with in isolation from its wider social and political setting but is made to be more responsive to social conditions and community expectations.

The Code makes available to the criminal court a wide range of penalties and measures and allows it a fairly free choice in selecting among several theories of punishment. But this does not encourage the court to respond sensitively to the facts of each case. Rather, it gives the court licence to pursue penal philosophies of its predilection, something that is a major source of disparity in sentencing among members of the higher and lower judiciary. For, while some of them lean towards preventive goals of punishment others are more inclined to retributive philosophy. Compensation or restorative justice is never considered, seemingly because no legislation requires the criminal court to do so. The policy appears to be that it is for the victim of an offence to take

the initiative in seeking compensation by suing the offender in tort or by making a civil claim alongside the prosecution of an offence.

Section 1. Retribution

The concept of retribution arose from old time notions of wreaking vengeance and inflicting pain by society on behalf of itself and/or the victim of wrongdoing. For example, capital punishment and imprisonment with ‘hard labour’ (i.e., extra harshness of punishment; punishment additional to mere imprisonment) are vengeful in that they are based on the idea of retribution, the feeling that a more wicked man should suffer more severe pain. Contemporary ideas of retribution are, however, more nuanced and enlightened in attempts to recalibrate the balance of society disrupted by the criminal conduct. Retribution is no longer private or group action. It is now legal revenge and involves notions of ‘just desert’ and expiation.

§1. Legal revenge

Historically, the development of the tribunal witnessed the end of self-help ‘justice’ and the institutionalisation of retribution. Institutionalised retribution takes the form of legal revenge. Its goal is to smooth out criminal activity and to prevent collective or personal vendetta.

The retributive philosophy of punishment involves a process of ‘looking back’ at the circumstances of the crime committed. Retrospection enables the court to decide what punishment the convicted offender deserves for his conduct, having regard to his responsibility for the crime.

§2. Just desert

In its contemporary form, retributive philosophy² is presented as ‘just desert’. Justice is served when everyone gets what they justly deserve. On one side of the wheel of justice is distributive justice, and on the other side is retributive justice. On the side of distributive justice, ‘just desert’ refers to rewards; on the side of retributive justice, ‘just desert’ refers to punishment.³ In relation to punishment, just desert is in fact simply proportionality theory. It is based on the notion that sentence communicates official censure or blame to the offender as a moral agent who has the capacity to assess and respond to an official evaluation of his conduct. The evaluation is communicated to the offender by imposing on him a proportionate sentence, and not any greater

² This encompasses notions of expiation or atonement; ethical theory; and legal revenge, a notion traceable to the ancient *lex talionis*.

³ Köneke Vanessa, *Retributive Justice: Psychology of Justice*, Grin Verlag, 2011.

sentence that punishes him in order to achieve a preventive goal by deterrence or incapacitation.

Punishment must therefore be just or fair. The convicted offender should not receive greater punishment than his offence deserves. The importance of the just desert notion is that it acts as a check on the backward-looking principles of deterrence or reformation. Essential to the principle of just desert is the concept of responsibility or culpability. A person merits punishment only to the degree that he was responsible for his criminal act.

Ashworth, the authoritative English sentencing scholar, posits that the touchstone for the desert theory is 'ordinal and cardinal proportionality'.

“Ordinal proportionality concerns the relative seriousness of offences among themselves. Cardinal proportionality relates the ordinal ranking to a scale of punishments, and requires that the penalties should not be out of proportion to the gravity of the crime involved.”⁴

It follows from this concept that the less serious an offence is the lower the penalty it ought to attract, and that the more serious an offence is the higher the penalty it should attract. The problem with the proportionality or desert theory of punishment is that there is no guidance on the severity level that is proportionate to a particular kind of offence. It is difficult to say what fair proportion there is between a crime and its attendant punishment.

Nevertheless, it is generally assumed that there do exist in a community general notions of what is a just desert taking into account all the circumstances of a case. It is possible to list criminal behaviours by ranking them in a presumed order of severity and then apply similarly ranked punishments proportionately. If stealing is ranked as a more serious or harmful crime than pollution, for example, then the thief should be punished more severely than the polluter. But this would be rather too simplistic. In a given fact situation, what was stolen might be small, and the polluter might have caused a huge environmental damage and therefore deserving of a more severe punishment than the thief.

However, it seems that courts, by appealing to mitigating and aggravating factors when that is warranted, somehow adjust punishment to achieve a degree of proportionality. Further, although the parameters of the relative seriousness of offences among themselves may be uncertain, the Code appears to have anchoring points for penalty scales which the lawmaker regards as 'naturally' appropriate.

⁴ Ashworth A, *Sentencing and Criminal Justice*, 4th ed., Cambridge, Cambridge University Press, 2005, p. 84

§3. Expiation

A closely related, if not identical, purpose to retribution is expiation. Rather than focusing upon seeking revenge against the offender, expiation aims at cleansing or purifying society by removing the offender temporarily (imprisonment) or permanently (deportation to a faraway penal colony, as was once the case; execution) from its midst. This aspect of revenge theory of punishment overlaps with preventive punishment which is based on permanent or temporary incapacitation.

Section 2. Prevention

The goal of crime prevention embraces theories of deterrence, incapacitation, restraint, and social rehabilitation (re-socialisation, reformation). Here, the aim of punishment is no longer solely retribution for harm done. Punishment is also inflicted for purposes of deterrence, reformation and incapacitation (public protection through restraint), that is, for practical or useful purposes. These are utilitarian principles of punishment and are essentially forward-looking. Punishment is imposed with an eye to its future results, the fundamental aim being to prevent further crime.

§1. Deterrence

Deterrence relies on threats and fear as a method of achieving crime prevention through sentencing. Since it looks to the preventive consequences of sentence it is sometimes described as ‘consequentialist’⁵. Punishment for each offence should reflect the ability of that punishment to deter commission of that offence.⁶

Deterrence may be individual or general. Individual deterrence is concerned with deterring this particular convicted offender from reoffending. This entails escalating sentences for persistent offenders, on the reasoning that

⁵ Idem, p.75.

⁶ In his economic analysis of law Posner canvasses what he calls ‘optimal criminal sanctions’ theory. Posner, a Marxist legal scholar, explored the ‘economics of justice’ as did Pareto before him. Pareto grounded the economic analysis of law on efficiency or what is sometimes called ‘Pareto optimality’. Posner on the other hand put forward the ‘optimal criminal sanctions’ theory. The theory advocates the imposition of fines instead of a custodial sentence in order to deter criminal acts by increasing their economic cost to offenders while yielding punishment at the lowest cost to society. Posner R, *An Economic Analysis of Law*, 3rd ed. 1986, pp. 201-226; see also, Ehrlich, ‘The Deterrent Effect of Criminal Law Enforcement,’ 1 *J. Leg. Stud.* 259-276 (1972): an economic analysis of the extent to which law enforcement deters criminality; van den Haag, ‘Punishment as a Device for Controlling the Crime Rate,’ 33 *Rutgers L. Rev.* 706, 718-719 (1981): comparing deterrent and ‘retributionist’ theories of punishment.

if a lower sentence fails to deter, then a higher sentence must be tried. The main determinant of the sentence here is not the gravity of the offence but the propensity to reoffend. The propensity to reoffend is, however, influenced in no small measure by beliefs about the probability of detection and the certainty of punishment. Such beliefs rather than the severity of punishment are significant factors that are more likely to influence human behaviour. Unfortunately, there is little detailed knowledge about the beliefs and thought processes of actual and potential offenders.

A controversial factor believed by some to be conducive to individual deterrence is poor and harsh prison conditions. According to this view, even a short term of imprisonment conduces to individual deterrence, provided the prison conditions are Spartan and harsh rather than what some see as the ‘four star hotel’ conditions demanded by human rights law⁷. Further, medium length sentences of imprisonment might provide nearly equal deterrence. This means that very long sentences of imprisonment aimed at achieving the same goal of deterrence might not be worth their extra cost.

General deterrence seeks to deter other people from committing the kind of offence committed by the convicted offender. It is based on the assumption that by imposing punitive sanctions upon one convicted offender, other potential offenders with similar propensities will be deterred from engaging in such conduct. The justification for inflicting enhanced penalty on this convicted offender for purposes of general deterrence is that the benefits of general deterrence outweigh the pain inflicted on him. From the deterrence perspective therefore, courts are required to calculate sentences to be sufficient to deter potential offenders from committing this kind of offence. Underlying general deterrence is the assumption that people are rational beings who will adjust their conduct according to the disincentives provided by the sentencing law and that increasing penalty levels by a certain amount will result in a decline in offending.

⁷ Standard Minimum Rules for the Treatment of Prisoners, adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, 1955, and approved by ECOSOC by its resolutions 663 (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; Basic Principles for the Treatment of Prisoners, adopted and proclaimed by UN General Assembly Resolution 45/111 of 14 December 1990; Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, adopted by UN General Assembly resolution 43/173 of 9 December 1988; and United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by UN General Assembly resolution 45/113 of 14 December 1990. Article 10 of the ICCPR requires “all persons deprived of their liberty [to] be treated with humanity and with respect for the inherent dignity of the human person.” The same Article provides that the “penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”

A major criticism levelled against the deterrence theory is that empirically there is a dearth of necessary evidence and of necessary factual data to support the foundation of a deterrent system. There is bound to be a large number of people who are unlikely to be deterred, in part because being in or out of prison makes no difference to them, and in part also because they see the potential rewards of offending so attractive.

Moreover, there is no certainty that an offender will in fact be detected, prosecuted, convicted and receive a specified punishment. Indeed, offenders tend to be optimistic about the risk of being caught. That is why they offend in the first place. Offenders would desist from offending if they did not calculate that they are unlikely to be caught. Their optimism is strengthened by the fact that the detection rate for all crimes is, generally speaking, very low. This means there is a fairly low risk of detection. Thieves, in particular, are said not to be rational calculators. They are rather short-term hedonists or eternal optimists basking in a philosophy of hope that they will not be caught. Further, most offenders are ignorant of penalties for most crimes. And even if they are aware of the penalties, it is far from established that fear of the legal penalty is the particular factor that leads to the avoidance of the proscribed conduct. General deterrence is therefore probably more likely to be effective for planned or professional than for impulsive crimes.

“Deterrence must operate (if at all) through the potential offenders’ minds, so it is essential that they know about the severity of the probable sentence, take this into account in deciding whether to offend, believe that there is a non-negligible risk of being caught, believe that the penalty will be applied to them if caught and sentence,, and refrain from offending for those reasons. These subjective beliefs are vital components in the operation of deterrence policies, and all must therefore be investigated if research is to be reliable. Few studies satisfy these criteria, and they provide no basis for sentencing policies that involve increasing severity in order to reduce offending levels.”⁸

Arguably, what is likely to limit criminality is effective policing, the improvement of detection services, certainty of prosecution, and a strong likelihood of conviction and sentence rather than severity of punishment.

Another important criticism of deterrence theory is the principled one that deterrence could be used to justify the punishment of an innocent person if

⁸ Ashworth, *op. cit.*, p.76.

that were certain to deter several others. The theory can be used to justify the imposition of a disproportionately harsh sentence on one offender simply for the sake of deterring several potential offenders from committing a similar offence.

“General deterrence ... means that the punishment is (also) aimed at a wider audience; society as a whole or at least a significant part of society. Thus, while the primary function of punishment in this context might be aimed at the individual offender; the particular punishment might also serve the secondary aim of deterring society in general from committing the type of crime in question. There is a problem here, however: if the punishment meted out to the individual offender is disproportionately harsh in order to serve as a warning to the rest of society, then the punishment can no longer be described as a ‘just desert’.”⁹

There are those who assume, and who find it intuitively appealing, that a kind of hydraulic relationship exists between court sentences and criminal behaviour. Sometimes, therefore, judges and magistrates pride themselves in passing so-called ‘exemplary sentence’ in the naive or mistaken belief that such a sentence would serve purposes of general deterrence. In reality, passing such a sentence, like passing the death sentence in countries that still retain capital punishment, is often due to media or political pressure to respond to public anxiety about ‘rising criminality’.

Sometimes, also, the law-maker prescribes mandatory sentences in certain cases based on the simplistic view that such penalties would have a significant deterrent effect. Deterrent rationales and high sentence levels are prominent features in the Penal Code for offences such as aggravated theft, corruption, treason, and certain types of sexual offences and deviancy. In respect of these offences courts tend to impose penalties which are more severe than a proportionate sentence would be. Courts do this in order to achieve general prevention for such offences. But it is doubtful whether a few extra years of an offender’s liberty should be sacrificed by the courts in the mere hope of deterring several potential offenders. It is even uncertain how great an increase in severity the courts are prepared to go without necessarily imposing the statutory maximum; how they can go about communicating severity to the targeted audience; and whether generally speaking severity of penalties for those types of offences has already reached saturation point.

⁹ Kemp et al., p. 21.

An objection to heaping an underserved portion of punishment on one offender in the hope of deterring others is that it penalises an individual in order to achieve a social goal. According to a 1990 Home Office White Paper in England¹⁰, many jurisdictions recognise that “it is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up possibilities in advance and base their conduct on rational calculation.” Be that as it may, sentences, as Ashworth notes, are not the only form of general deterrence flowing from the criminal justice system. In some cases, he says, it is the very process itself that is the punishment – being prosecuted, appearing in court, receiving publicity in the local newspaper – rather than the sentence itself. In some cases the shame and embarrassment in relation to family, organisation, workplace, friends and the community are said to have a more powerful effect than the sentence itself.

§2. Incapacitation

To incapacitate an offender means to deal with him in such a way as to make him incapable of offending for substantial periods of time. Incapacitation is usually directed at dangerous offenders, career criminals and other persistent offenders. Sentencing purpose based on incapacitation seeks to ensure public protection. This has a political appeal as it suggests that there are exceptional circumstances in which the right of the convicted offender should yield in the interest of public protection. Incapacitative punishment includes such supreme disabling and irreversible measure as the death penalty. In some criminal justice systems, it also comprises corporal punishment, including the severing of limbs. These irreversible measures are strongly opposed by human rights scholars and activists on humanitarian grounds.

Other forms of incapacitating punishment are natural life imprisonment and lengthy periods of imprisonment, the latter being a less draconian form of disablement. Incapacitating sentencing strategy is based on the belief that dangerous or high-risk offenders can be identified, convicted and then given long, and therefore disabling, custodial sentences. This, it is believed, will result in a reduction in the number of crimes likely to be committed by this category of offenders. Proponents of incapacitating sentencing argue that reduction in the number of crimes represents a benefit in crime prevention in that it achieves the goal of public protection against the targeted category of criminals.

However, evidence of the incapacitating effects on crime prevention is inconclusive. In any event, it seems unfair that individuals should be punished,

¹⁰ Quoted in Ashworth at p. 79.

over and above what they deserve (i.e. disproportionately), in the hope of protecting future victims from harm. Reasonable minds would argue that it is morally objectionable to sacrifice one offender's liberty in the hope of increasing the future safety of others. Mild forms of incapacitation include short term disqualification from driving, from working with children, from being a company director, and so on.

§3. Rehabilitation

Rehabilitation is sometimes known as re-socialisation or reformation. It is doubtful that the criminal justice system is good at 'reforming' people. But the appeal of the reform approach lies in the fact that reform connotes positive impressions of the betterment of individuals and society, and calls to mind moral education theory. The concept of rehabilitation is not a punishment approach under which some unpleasantness is imposed upon the offender. It is rather a preventative approach meant to prevent the offender from reoffending. This is achieved by changing the offender's attitude, inducing a state of repentance and greater awareness of the character and demands of society so that the offender himself will voluntarily refrain from offending again. The rehabilitative rationale for sentencing thus pursues the same goal of crime prevention as do the deterrence and incapacitation rationales. Its distinctive method involves the rehabilitation of the offender 'in his own best interest'.

To achieve this goal, there is usually available a range of sentences and facilities designed to offer various programmes of treatment. Sometimes the focus is on the modification of attitudes. Sometimes it is on dealing with behavioural problems. At other times it is on educating people out of a certain way of behaviour that is prevalent. Sometimes the aim is to provide education or skills, in the belief that these might enable offenders to find occupations other than crime. Crucial questions for the sentencer are therefore those relating to the perceived needs of the offender, not the gravity of the offence committed. The motivation here is benevolent.

"The rehabilitative approach is closely linked with those forms of positivist criminology which locate the cause of criminality in individual pathology or individual maladjustment, whether psychiatric, psychological or social. Whereas deterrence theory regards offenders as rational and calculating, rehabilitative theory is aimed at those who are regarded as being in need of help and support. One element in determining those needs is a report from an expert – for example, a pre-sentence report prepared by a probation officer or, occasionally, a psychiatric report. Such

a report would usually advise on the form of programme that matches the perceived needs of the offender, and the court may then make the appropriate order [under the rehabilitative theory the so-called expert wields considerable powers and it recognises no right in individuals to be regarded as worthy of equal respect and concern]. In their heyday, the operation of these ‘treatment models’ often led to sentences that were indeterminate, on the basis that a person should only be released from obligations when, in the opinion of the experts, a cure had been found.”¹¹

The extent to which rehabilitative programmes are better at preventing reoffending than ordinary, non-treatment sentences are not clear. This point has not been researched in this country. But anecdotal evidence suggests that rehabilitative programmes were available up to the early 1970s for a small number of offenders at the Buea Prisons. These programmes were properly resourced and were based on sound principles at the time. They were quite successful in providing skills to offenders who then found gainful occupations on being discharged. The programmes appeared to have achieved a measure of crime prevention at the time.

The essence of the rehabilitation principle is individualisation of treatment. And one of its most notable methods is probation. The rehabilitation principle exposes the community to risk in that a convicted offender is left at large. A high degree of reoffending (recidivism) amongst those who have been imprisoned might suggest that reformation does not work. Indeed, it may be argued that there is disillusionment about rehabilitation as an aim of sentencing. In fact, the prison system in this country is a complete negation of rehabilitation as a sentencing rationale. Prison conditions are generally so bad that by the time of their release, many prisoners are disfigured physically, mentally and psychologically. Reintegration into society is not easy because ex-convicts are always regarded with disdain and suspicion by community members. The prison in this country is thus not a place, and is not designed to be a place, for rehabilitation.

Section 3. Restoration and reparation

Systems of criminal justice seek to deal fairly with offenders. But it is recognised that it should also be part of the legitimate concern of the criminal

¹¹ Ashworth, *op. cit.*, p.82.

justice system to assist victims of crime. Crime is no less about victims than it is about offenders.

“Justice is not a one-way traffic,” declared a Nigerian Supreme Court Judge. “It is not justice for the appellant only. Justice is not even a two-way traffic, but a three-way traffic: justice for the appellant accused of ... [crime], justice for the victim ... and finally, justice to the society at large whose social norms and values had been desecrated and broken by the criminal act complained of.”¹²

§1. Rights of victims of crime

It is only fair that the criminal justice system should ensure that victims receive proper help and support. To begin with, criminal justice systems rely heavily on victims for information about crimes and about offenders. They also rely on victims for evidence in court. Moreover, states have a duty to ensure that victims of crime receive compensation because the state is responsible for maintaining law and order, and, from a human rights perspective, crimes result from a failure of due diligence by the state in that regard. In recognition of this reality, some jurisdictions have instituted victim support schemes to bring help, support and advice to the victims of serious crimes. Others have established a state scheme for criminal injuries compensation confined to serious crimes of violence.

It is now generally accepted that greater consideration should be given to the position of the victim as a proper object of the court's attention when it comes to sentencing. Any efforts to address the consequences of criminal behaviour should, where possible, involved the offender as well as injured parties. Such efforts should also provide the help and support that the victim and offender require. Contemporary criminal justice systems, municipal as well as international, now recognise and pay increased attention to the rights, interests and needs of the victims of crime. The United Nations adopted in 1985 the *Declaration on the Basic Principles of Justice for Victims and Abuse of Power* and in 2002 the *Rome Statute establishing the International Criminal Court*. Article 68(1) of that Statute requires the Prosecutor to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses¹³.

¹² *Godwin Josiah v The State* (1986) 1NWLR 125, per Chukwudifu Oputa J.

¹³ One way of protecting the safety of a witness where there is legitimate fear of reprisal from the perpetrator of the crime or his friends is the technique of allowing the witness to appear in court and give evidence with his face or image pixilated and his voice digitally altered so as to disguise his voice and protect his identity.

This increased attention to victims' rights in the criminal justice system manifests itself in different ways in sentencing theory. One development is the granting of the right to make a victim personal statement to the court about the offence. The victim of crime in this country may join the prosecution of an offender by entering a civil claim against the offender in the criminal proceedings. Alternatively, he may sue the accused, whether convicted or not, in tort and claim compensation for any damage suffered.

§2. Restorative justice

Another development is the growing number of restorative theories of criminal justice. Restorative justice is an approach to criminal offending which involves the victim, the offender, their social networks, justice agencies, and the community. It entails apology, payment of compensation, and restoration of honour and dignity. This is so because restorative justice programmes are based on the fundamental principle that criminal behaviour not only violates the law, but also injures victims and the community.

The fundamental proposition is that justice to victims should become a central goal of the criminal justice system and of sentencing. This means that all the 'stakeholders' in the offence (the offender and the victim, their families, and the community) should become involved in discussions about the appropriate response to the offence. Restorative justice is thus a process for resolving crime by focusing on redressing the harm done to victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of the dispute. The aim is to bring about an apology, to ensure that the offender compensates the victim and the wider community for the effects of the crime, and to take steps to ensure that the offence is not repeated. Thus, as Lucia Zedner argues,

“Criminal justice should be less preoccupied with censuring code-breakers and focus instead on the process of restoring individual damage and repairing ruptured social bonds. In place of meeting pain with the infliction of further pain, a truly reparative system would seek the holistic restoration of the community. It would necessarily also challenge the claim of the state to respond to crime and would invite (or perhaps demand) the involvement of the community in the process of restoration.”¹⁴

Apparently the strength of restorative justice (sometimes also known as 'corrective justice', 'compensatory justice' or 'rectificatory justice') lies in the

¹⁴ Zedner, L., 'Reparation and Retribution: Are They Reconcilable?' 1994 *Modern Law Review*, 57: 233, cited by Ashworth p.89.

fact that victims appear to be satisfied with the process. Offenders who participate in the system tend to be truly remorseful and accept its outcome. Restorative justice can lead to the healing of victims. It can restore the community and reduce reoffending, at least as regard non-violent offenders. It thus has considerable attractions as a constructive and socially inclusive way of responding to criminal behaviours.¹⁵

In traditional Africa peace and reconciliation practices in the justice system are significant not only in rebuilding relationships at personal level but also in healing the community and in pre-empting the dangers of escalatory revenge. The practices are an acknowledgement of the fact that reconciliation looks and speaks to the future whereas accountability is preoccupied with the past. The past is yesterday but the future is tomorrow which must be safeguarded for long-term social stability. It is in this context that the ‘modern’ criminal justice system is sometimes seen as inimical to community peace.

Not much use has so far been made of the court’s reconciliation jurisdiction in criminal cases under s. 34 of the Magistrates’ Courts (Southern Cameroons) Law, 1955, and s. 26 of the Southern Cameroons High Court Law, 1955. Both provisions are couched in identical phraseology, thus:

“In criminal cases a magistrate [or the High Court] may promote reconciliation, and encourage and facilitate the settlement in an amicable way, of proceedings for common assault or for any other offence not amounting to felony and not aggravated in degree, in terms of payment of compensation or other terms approved by him, and may thereupon order the proceedings to be stayed.”

§3. Restitution, confiscation and forfeiture

In many jurisdictions the criminal court has power to make a wide range of orders including a restitution order, a confiscation order for property used in the commission of crime (i.e. instrumentalities of crime), and a forfeiture order. An order for the confiscation of the instrumentalities of crime is a conviction-based asset forfeiture order. It may be satisfied by executing it against any property held by the convicted offender, including property that was legitimately obtained. Depriving an offender of any property used in the commission of crime and depriving him of the proceeds of crime have been a feature of criminal law for decades. This is known as criminal asset forfeiture and it is an integral part of criminal law enforcement in many countries. An order of forfeiture of property and of the proceeds of an offence is readily

¹⁵ Ashworth, *op. cit.*, pp.88-90.

made on conviction for crimes such as gambling, property offence, misappropriation, corruption, fraud, counterfeiting, racketeering, smuggling and trafficking in drugs or persons, as well as in respect of any property used to facilitate the commission of an offence.

Confiscation of criminal assets is a critical weapon in the fight against organised crime (eliminating the organisation) and in combating individual and group criminal behaviour. The policy of the criminal law in this regard is not only to put the offender behind bars but also to remove the tools of crime from circulation so that they cannot be used again either by the offender himself on his release or by any potential offender. Asset forfeiture also enables the recovery of property which may then be used to compensate innocent victims of the crime. It furthermore takes the profit out of crime by ensuring that the wrongdoer is deprived of the fruits of his criminal conduct.

The forfeiture of the *instruments* used in crime commission, also known as instrumentality forfeiture, is one type of criminal asset forfeiture. The other type is the forfeiture of the *fruits* of criminal activity, that is, proceeds forfeiture. A third type of criminal asset forfeitures is the forfeiture of *property held* by the convicted offender. The first two types are civil forfeitures in that it is not necessary to secure a conviction in order for the court to order such forfeitures. The court need only be satisfied on a balance of probabilities that the subject-matter in question is the instrument or the proceeds of a crime. Where the court is satisfied on a preponderance of evidence that there is a connection between the subject-matter in question and the offence committed, any fruits of the offence (such as contraband goods, money from the sale of drugs, laundered money) or any instrument (e.g. a motor vehicle), whether or not owned by the offender, which facilitated the commission of the offence, may be included in the forfeiture order. Third-party property interest involved in such cases, if any, is usually protected by 'ancillary proceedings' conducted by the court at the conclusion of the criminal trial.

By contrast, an order for the forfeiture of property held by the convicted offender can only be made following his conviction and then only if the property in question belongs to him. The order is part of the sentence pronounced by the court and is punitive in character. But it is not an act *in rem* directed against the specific property as such. Rather, the court order is regarded as an act *in personam*: an act against the person, that is, an act directed against the offender compelling forfeiture of the specific property belonging to him. It follows that if the forfeitable property has been dissipated or if it cannot be traced, the court can, in substitution of that property, pass a money judgment and order the offender to pay. The court can do so because its order

is an act *in personam* directed against the offender and not against the specific property that belongs to him.

§4. Compensation

In some systems of criminal justice the criminal court has power to make a compensation order for death, injury, loss or damage and even in cases where the offence causes distress and anxiety. Where an offender has limited means the principle is that a compensation order made by the court takes priority over a fine. This means the interest of the victim takes priority over that of society. One would have thought that the interest of the victim would also call for restitution. But there is no provision in the Penal Code that empowers the court to order restitution of, say stolen goods, with or without payment of an assessed sum of money. In making a compensation order the court would normally have regard to the means of the offender. The justification for this is that compensation orders which are too high to be paid would be prison sentences in disguise since compensation orders are enforced as if they were fines, and imprisonment is the ultimate sanction for non-payment. Compensation orders are thus not truly civil measures because in civil matters awards of damages are not reduced to take account of the means of the defendant.

The question of the relation of compensation orders to other sentences was expressed by Scarman LJ in *Inwood* (1974) 60 Cr App R 70, at p. 73, in this way,

“Compensation orders were not introduced into our law to enable the convicted to buy themselves out of the penalties for crime. Compensation orders were introduced into our law as a convenient and rapid means of avoiding the expense of resort to civil litigation when the criminal clearly has means which would enable the compensation to be paid.”

An offender's ability to pay compensation should not be allowed to deflect the court from imposing a custodial or other sentence, if that is what the offence justifies. If this were not so, the law would permit wealthy offenders to receive reduced sentences. This would infringe the principle of equality before the law. For less serious offences, the law accords precedence to reparative over punitive elements, in that a compensation order has priority over a fine. This priority is reversed for serious offences.

It is not known how frequently courts in this country make compensation orders. There are no available court statistics and no study on this topic has been conducted in this country. The theory behind compensation orders is

right. But there is one major practical drawback from the victim's point of view. An order can only be made if the offender is detected, prosecuted, convicted and is not penniless. Since many offenders go undetected and since not all reported offences are prosecuted, and since many offenders are people without means, a victim's prospects of receiving compensation from this source may not be bright at all.

The compensation order made by a criminal court would seem to sit rather uncomfortably with other forms of sentence and order. The order has a dual function. In many cases it operates simply as an ancillary order, to ensure some compensation to the victim in addition to the punishment contained in the principal sentence. Here the compensation order can be justified as a reparative element which accompanies the proportionate sentence. In other cases, compensation becomes a central feature, as where it takes priority over a fine and particularly where it is the sole order in the case. In this instance the compensation order is hard to justify. How can the order be regarded as sentencing when, in effect, the court is merely making a relatively rough and ready award of damages to the victim? The offender would have been civilly liable to the victim in almost all cases and therefore, the argument goes, the court's order amounts to nothing in sentencing terms – no punishment, but rather a kind of civil award made by a criminal court.

One counter-argument to this is that, in practice very few victims sue their offenders. Therefore, in practice, the compensation order does transfer from the offender to the victim money which the offender would not otherwise have been made to pay. It may therefore be realistic to regard the compensation order as punitive in its effect on the offender, as well as reparative in relation to the victim. Another counter-argument would be that orders do not have to be punitive anyway. The compensation order should be applauded as a form of reparative justice, or at least as recognition that the criminal justice system ought to be multi-functional rather than limited to punitive responses.

There is no requirement in the Code that in passing sentence the court must take into account the interests and needs of the victim of crime. Reflective of an increasing recognition of the needs, wishes and rights of the victim of crime, courts in many other jurisdictions consider it their duty to make a compensation order in favour of the victim or his family in offences involving injury, death, loss or damage, mindful of the means of the offender. An entire law discipline, known as '*victimology*', has grown around this area.

In this country, apparently the victim of a crime may join as a civil party in the prosecution of the accused and claim compensation in the event of a conviction or, alternatively, bring a separate action in tort against the offender.

But there are no rules or guidelines regarding the procedure to be followed in such a case, the nature of evidence to be adduced, the requisite standard of proof when such a claim is made, and the amount of compensation that may be awarded by the court. There is no state compensation scheme for victims of crimes of violence. In practice, most victims of crimes of violence or damage do not bother to seek compensation. Part of the reason is cultural. In some ethnic cultures such compensation, especially in cases of death, is regarded as 'blood money' and therefore shunned, the reasoning being that no amount of compensation will bring the deceased back to life.

Penalties and Preventive Measures

The penological distinction between punishment and prevention corresponds to the dichotomy in the Penal Code between ‘penalties’ and ‘preventive measures’. A penalty is punishment imposed on a defendant by the court after conviction for an offence committed by him. It is a punitive weapon in the armoury of the criminal court, invariably used when the object that is desired to be achieved by sentencing is retribution or public protection or both. A preventive measure, by contrast, is one imposed by the court on the person concerned to prevent a threatened offending or to prevent re-offending. It thus looks to the reduction of the risk of reoffending or, sometimes, of the risk of an offence merely threatened. It is imposed when the object in view is re-education, treatability, and prevention of reoffending. It is a defensive weapon meant for the future protection of the public and even of the convicted offender.

The punishment imposed by a court may consist not only of a principal penalty. It may also consist of an ancillary penalty. It is thus often important to determine whether a particular ancillary sentence amounts to a penalty or is merely a preventive measure. If a sentence has a significant punitive element and operates retrospectively, then even though it is also to some extent preventive, it would be a penalty. A confiscation order, for example, is a penalty even though it has punitive as well as preventive and reparative aims.

The Code provides various sentencing options in the form of principal penalties, a wide range of accessory penalties, and an equally wide range of ancillary orders in the nature of preventive measures. The drafters of the Code measured and graded in the abstract the evil resulting from crime. This yielded an elaborate scale of permissible penalties and measures. Within this range and scale, the judge enjoys discretion and flexibility in response to different combinations of facts and the circumstances of the convicted offender. The court is then in a position to pass an appropriate sentence that fits not only the offence but also the offender.

Section 1. Penalties

A penalty is a punishment prescribed by law for an offence. Penalties are of two types, principal¹ and accessory². This distinction is crucial in the Code because the classification of offences as felonies, misdemeanours and simple offences is based on the principal penalties prescribed for them.

§1. Principal penalties

The principal penalties or forms of punishment available to the court when deciding on an appropriate sentence are death, imprisonment, and fine.³ Sentences are graduated in terms of severity. The least severe sentence consists of the fine. Fines are the least onerous. Next is the suspended sentence which may or may not be combined with probation. Next still is ordinary imprisonment. This is usually imposed when the court is of the view that neither a fine nor a suspended sentence (combined or not with probation) could be justified and that imprisonment is therefore required. The severest penalty is the death sentence, which this country still maintains for a large number of offences. Policy makers justify higher sentences of imprisonment and, controversially, capital punishment, on grounds of public protection. The law makes no provision for any other form of principal penalty, such as the sentence to a community service which is available to the court in some jurisdictions.

Fine. A fine is a monetary form of punishment. A court cannot sentence an offender to pay a fine in kind. The fine alone remains the most used penal measure, especially for summary offences. It is seldom used in cases of misdemeanours (when used, it is combined with a term of imprisonment) and hardly ever at all in cases of felonies.

When the Code provides, as it does in very many cases, for a minimum and a maximum penalty for an offence the nagging question that has never been answered is this. Is the court required, when sentencing the convicted

¹ Sections 22 to 29, Penal Code.

² Sections 30 to 34, Penal Code.

³ Before 1968, an offender in Cameroun Republic could be sentenced to forced labour, reclusion, deportation, and, in the case of political offenders to detention or banishment. Since then, banishment disappeared as a form of punishment but not the forms. Forced labour and reclusion were simply converted into imprisonment for a term or for life; and deportation converted into detention for life. Clarence Smith JA, 'The Cameroon Penal Code: Practical Comparative Law', *International and Comparative Law Quarterly*, vol. 17, July 1968, 651, 655; R Parant et al, 'Le Code Pénal Camerounais, Code Africain et Franco-Anglais,' *Revue Science Criminelle et Droit Pénal Comparé*, 1968, p.339, 359; JB Herzog, 'Le Projet de Code Pénal Fédéral du Cameroun,' *Revue Science Criminelle et Droit Pénal Comparé*, No. 1, 1965, p. 212.

offender, to determine the amount of fine or the term of imprisonment and then leave it to the offender to choose as between paying the fine or serving the custodial sentence? Or must the court itself choose and impose a fine or a custodial sentence, as it sees fit? As a matter of sentencing practice, the courts simply impose a fine or a custodial sentence or both, as they see fit, perhaps on the reasoning that it is not for the convicted offender to decide the form of his own punishment. The counter-argument is that whether the decision in this matter is made by the trial court or by the convicted offender is of no moment because the law, by adopting the drafting technique used in prescribing penalties in the Code, must be taken to deem either form of punishment adequate.

Normally, a fine should reflect not only the seriousness of the offence but also the offender's ability to pay. There is no point sentencing an impecunious convicted offender to pay a heavy fine, even as a deterrent, when it is all too obvious that he will not be able to pay. Although this has not yet happened, it is clearly possible that stipulated fines could in the future become inadequate or obsolete owing to inflation and a resultant devaluation of the local currency. Were this to happen the legislature would have to adopt corrective measures to ensure that the fines provided are adequate. In the meantime courts would have to adjust pecuniary sentences by steering closer to the maximum fine provided for the offence for which the accused stands convicted.

In some jurisdictions, where an offender is sentenced to pay a fine and a compensation order is also made against him in favour of the victim of the offence, priority is given to the compensation order over the fine if the offender has limited financial means and appears unable to pay both. This is not the case under the Penal Code. There, the offender is required to pay the fine. Compensation for the victim of a simple offence is ordered only after it becomes clear that the convicted offender cannot pay the fine imposed on him.⁴

This is rather odd because if the offender is unable to pay the fine his financial ability is not suddenly improved just by the mere fact that what he is now required to pay is denoted as 'compensation' rather than 'fine'. But the reasoning of the law appears to be this. The amount due is compensation (i.e. payment made as reparation) and not a fine. If the offender is unable to pay, it becomes a civil debt payable to the judgment creditor. This amount can then be recovered by civil process, for example, by writ of *feri facias* (fi.fa). This is a writ of execution addressed to the sheriff requiring him to seize property of the debtor in order to obtain payment of a judgment debt, interest and costs.

⁴ Sections R. 364-366, Penal Code.

In this way the offender escapes going to prison for inability to pay the fine to which he was originally sentenced. But then the Penal Code makes provision for imprisonment for non-payment of a fine imposed upon conviction for a simple offence. An anomalous situation might therefore arise of the possibility of a convicted offender being committed to prison for non-payment of a fine, even though the original offence (i.e. the simple offence that was committed) was not thought to merit imprisonment. These are however moot points because in practice fines for simple offences are so niggardly that they are within the ability of even the poor in this country to pay. The maximum fine for a simple offence under the Penal Code is FCFA 25 000, the equivalent of less than USD50.

Suspended sentence. When the court concludes that a sentence of imprisonment is justified and decides on its length, it may still have the choice between a suspended sentence, and immediate imprisonment. The court may decide on a suspended sentence if the convicted offender had “not previously [been] sentenced to imprisonment, or where after such sentence his conviction has been expunged.”⁵ If it decides that this ground for suspending exists, it is required by section 54(1) of the Penal Code to record this fact in the judgment and may then “suspend for a period of from 3 to 5 years the enforcement of any sentence of imprisonment for 5 years or less, or of fine not imposed” as a substitute for loss of liberty under section 92(2) of the Code. In such a case, the court may combine the suspension with probation, the probation period not exceeding 5 years.⁶

During the probation period the offender is subjected to general and, in a fit case, to added special obligations of supervision and assistance superintended by a magistrate with the assistance of a probation officer.⁷ The offender whose sentence is suspended on probation is required to comply with one or more requirements taken from the list available under sections 41 and 42 of the Penal Code. Non-compliance or breach of obligations may result in return to court and the activation of the whole or part of the prison sentence.⁸ If the court believes that neither a suspended sentence nor probation is appropriate in the circumstances and that a custodial sentence is proper it will impose a term of imprisonment.

⁵ Section 54(1).

⁶ Section 55(1)(2).

⁷ Section 56.

⁸ Ss. 54(3) and 60).

Imprisonment. Next form of punishment in ascending order of severity is imprisonment, which is loss of liberty by confinement for a stated period of time.⁹ The Code generously provides for imprisonment for various offences, a punishment the court imposes at its discretion. The higher and the lower judiciary have shown themselves not to be economical in the imposition of such punishment. For one thing, there is no law, policy or directive requiring restraint in the use of imprisonment. As a result, there is an excessive use of imprisonment in this country and the general level of prison sentences is just too high. There has never been any reflection on the cost of different sentences and their relative effectiveness in preventing reoffending. There is no study on the economic benefits of a high incarceration rate and the ever-growing prison population.

There is a school of thought that argues that a high custodial population is wasteful and that keeping a convicted offender in prison in this day and age of respect for human rights is just too costly. The example is given of the United States of America where it is estimated that it costs about \$1000 (i.e. FCFA 500 000, the monthly salary of a top notch civil servant) per month to keep an offender in prison! The high cost of keeping an offender in prison, especially for a long period of time, tends to reinforce the criminological arguments that prisons may be counter-productive and that more severe punishment does not mean more effective criminal justice system.

In this country there is no requirement that before imposing a custodial sentence, the court must be satisfied that the offence was so serious that a fine (or a preventive measure) cannot be justified. This means the court is not required to consider and then dismiss all lesser alternatives penalties (fine,

⁹ It used to be the case that when an offender is given a custodial sentence, this takes the form of either detention or a term of imprisonment. A person sentenced to detention is of course imprisoned. Imprisonment is a penalty of loss of liberty of a specified duration imposed on a person convicted under the ordinary law. Detention on the other hand is a penalty of loss of liberty, often of an indeterminate duration, inflicted upon a person convicted of a 'political offence.' Section 26 of the Penal Code defines 'political offence' in terms of the prescribed punishment: any offence for which the stated punishment is 'detention' is a political offence. An offence is political if and only if the legislator prescribes detention as its punishment. The distinction between 'imprisonment' and 'detention' was thus crucial under the code. Imprisonment, as defined by section 24 of the Code, is "loss of liberty during which the offender shall be obliged to work, subject to any contrary order of the court for reasons to be recorded in the judgment." Detention on the other hand was "loss of liberty imposed for a political felony or misdemeanour, during which the offender shall not be obliged to work, and shall be confined in a special establishment separately from those convicted under the ordinary law." Political detainees were separated from ordinary law prisoners. They are confined to a special establishment or failing such establishment, in a separate wing of the ordinary prison. A person sentenced to detention, unlike a person sentenced to a term of imprisonment, is not obliged to work. Furthermore, since the political prisoner does not work, no proceeds of work accrue to him, and therefore no prisoners' fund for him on discharge.

suspended sentence with or without probation) before resorting to imprisonment. The court may decide on imprisonment even if the alternative of a fine would be justified in the circumstances. However, if the court decides on imprisonment then the sentence must be for the term commensurate with the seriousness of the offence, or in the phraseology of section 93, 'the public danger which it may represent'.

In determining the length of any custodial sentence, courts are bound to apply any relevant guidelines, and to take due account of aggravating and mitigating factors, and of previous convictions. By section 93 of the Penal Code,

"Sentence of penalty or measure shall vary, within such limits as may be prescribed or authorised by law, according to the circumstances of the offence and to the public danger which it may represent, to the circumstances of the offender and to the likelihood of his reformation, and to the practical means of carrying out."

Section 25 of the Code deals with prisoners' fund and provides that

"the proceeds of every prisoner's work shall be applied in part to the payment of any fines and expenses to which he is liable, in part to the discharge of any damages awarded against him in the criminal proceedings, in part to his family, in part to the furnishing of amenities at his request if he has deserved it, in part to the building up of a reserve fund payable to him on release, and the balance to the Treasury."

In some jurisdictions the sentence of 'natural life' imprisonment or penal servitude for life exists for the most serious offences. This sentence is considered by abolitionist states as a salutary or appropriate substitution for the death sentence unlike the indeterminate sentence of life imprisonment which some consider as not a sufficiently deterrent sentence for the most serious offences. But opponents of 'natural life' imprisonment argue that it is inhumane and a disguised base notion of 'state-authorised vengeance'. They point out that the natural life sentence is merely another form of absolute incapacitation, likely to raise the spectre of the resurrection of capital punishment because it denies the offender convicted of the most serious offence any prospect for parole or release on licence.¹⁰ A natural life sentence means the convicted offender spends the rest of his natural life in prison. By

¹⁰ Anderson J, 'Sentencing and the Unlikely Scholar,' *The Newcastle Law Review*, 2005-6, volume 9, p.99.

contrast, where a long term of imprisonment is imposed, whether determinate or indeterminate, the offender retains eligibility for release on parole. This, it is argued, raises important issues relating to equity and consistency in sentencing.¹¹

Most people would agree that many offenders need to be behind bars for reasons of public protection, for reasons of particular and general deterrence, for reasons of promotion of respect for the law, and because it is an appropriate punishment. However, it does seem that some offenders do not need to be sent to prison at all and that a good many do not need to be jailed for long. Some countries such as the USA and the UK have introduced 'intermediate sanctions' as a viable alternative to prison sentencing. The intermediate sanctions programmes is in fact a generic community service under which an offender serves part of the period of imprisonment in the community under close supervision with restrictions on their freedoms. The generic community service sentencing includes unpaid volunteer work for a number of weeks or months in public agencies or non-profit private agencies, a curfew requirement, electronic monitoring, and so on. The advantages of intermediate sanctions are that they relieve prison overcrowding, save taxpayers' money, promote fiscal responsibility, and still promote public protection.

The community service sentence has not been considered in this country. But arguably, a judicious application of the Code provisions relating to the suspended sentence and to probation would probably achieve the same goal of decongesting prisons, saving taxpayers' money while at the same time promoting public protection. Unfortunately, the human resource capacity and the necessary infrastructure to run community sentencing programmes are just not available in this country.

Death sentence. Capital punishment has raised and continues to provoke a great deal of controversy. The central argument for or against the death penalty used to be whether or not it serves as a deterrent to others. This has not and cannot be demonstrated empirically. Nor are the arguments for and against the death penalty conclusive. Current debate on capital punishment has gone beyond the traditional grounds based on deterrence, retribution, incapacitation and even public opinion. Retentionists concede the arguments by abolitionists that the death penalty is an extreme and irreversible form of punishment. The issue now is a straightforward one. Complete abolition of capital punishment is the right thing to do. This calls for the adoption of

¹¹ Ibid

strategies to get retentionist states, increasingly in the minority on this issue, to stop executing offenders including those convicted of serious crime.

This shift in the debate is informed by the conviction that arguments by states that retain the death penalty are weak, that no government can seriously defend capital punishment as legitimate or appropriate or justified, that the deterrent value of capital punishment cannot be conclusively proved scientifically, and that the abolitionist argument is now firmly *un acquis politique* and even *un acquis juridique* that needs only to be operationalized.¹² One thing is certain though. The death penalty is inconsistent with the right to life proclaimed and guaranteed by human rights instruments. Today, the world trend is unmistakably abolitionist. It is estimated that of the 195 Member States of the United Nations, 100 have abolished the death penalty; 7 retain it for crimes committed in exceptional circumstances such as in times of war; 40 maintain it in both law and practice; and 48 permit its use for ordinary crimes but have not used it for at least ten years and are believed to have instituted a moratorium on its use, or have a policy or an established practice of not carrying out executions. In Africa, the number of abolitionist states continues to increase.¹³

The drafters of the Penal Code were fully alive to the abolitionist trend worldwide. But they decided, for reasons that are not clear, to vote by a wide majority for the inclusion of the death penalty in the Code¹⁴ as if that issue was a matter that needed to be decided by a count of heads rather than by force of argument. The Penal Code maintains the death penalty for a number of crimes.¹⁵ However, no sentence of death may be carried out until it has been submitted to the State President for commutation and he has signified his

¹² Anyangwe C, 'Emerging African Jurisprudence Suggesting the Desirability of the Abolition of Capital Punishment,' *African Journal of International and Comparative Law* 23.1 (2015): 1-28.

¹³ As of 2014, African States that have abolished the death penalty *de jure* are 18 in number; 11 maintain it in both law and practice, and 25 permit its use for ordinary crimes but have not used it for at least ten years either because they have a moratorium in place or because they have a policy or an established practice of not carrying out executions.

¹⁴ Parant, *op cit*.

¹⁵ The death penalty is prescribed for the following homicidal offences: premeditated murder, murder by poisoning, murder committed in the course of committing another crime, murder of one's own parent, murder of a child under the age of 15, capital murder of a child within one month of its birth by a person other than its mother, death or grievous bodily harm caused in the course of committing aggravated theft. The death penalty is also prescribed for the following offences against the security of the state: assisting in hostilities against the state, taking part in hostilities against the state, instigating a foreign power to undertake hostility against the state, surrendering to a foreign power any troops or territory or defence secret or defence installation/equipment, secession in war time or state of emergency, provoking civil war. A recent (2014) ill-conceived and controversial terrorism law prescribes the death penalty for anyone found guilty of terrorism.

decision not to commute. Furthermore, a woman sentenced to death and who is pregnant may only be executed after she has had her baby.¹⁶ For reasons of religious sensibilities, no execution of a person sentenced to death may take place on Sunday or on a public holiday.

When the trial court passes sentence of death it must specify the manner in which execution is to be carried out. There are two lawful methods of execution in this country, by hanging (the hangman is not gone and the old method of hanging by the neck is still in use) or by shooting (a military or police firing squad carries out the execution in the prison yard or in public). The court must always specify by which of these two methods the death sentence it has passed is to be carried out. It is a grave moment indeed when the court pronounces the death sentence: "That you, Mantrouble Chi-Ajong, be taken from this place to a lawful prison and then to a place of execution and that you be executed by shooting (or by hanging); and might the Lord have mercy on your soul." The presidential decision not to commute a death sentence may direct that hanging or shooting be in public. As a matter of general practice most death sentences are carried out in gallows inside the prison yard. There have been occasions of public executions by firing squad designed mainly to serve as a deterrent, but the deterrent effect of such a gruesome public spectacle is doubtful.

§2. Accessory penalties

The very name 'accessory' suggests that these are not independent or stand-alone penalties but penalties that are linked to and are served out concomitantly with a principal penalty. A convicted offender cannot be sentenced to an accessory penalty only. The accessory penalty is an ancillary penalty and must be linked to a principal penalty. There are four types of accessory penalties. These are: forfeiture, publication of the judgment of conviction and sentence, closure of establishment, and confiscation.¹⁷

Forfeitures. Forfeitures are certain rights, privileges and capacities which a convicted offender may be deprived of as additional penalty for the crime committed. A forfeiture order is thus a privatory order, the purpose of which is to take from an offender something that he should not retain. By contrast, the purpose of preventive orders is to prevent the offender from engaging in certain kinds of activity thought to represent a risk to others. Section 30 of the

¹⁶ There is no recorded instance of the death sentence for and execution of a female offender in the Southern Cameroons just as the matter of political prisoners was completely unknown there.

¹⁷ Section 19.

Penal Code gives a list of forfeitures and section 31 prescribes the circumstances under which the court may make an order imposing all or some of them as accessory penalty.

The forfeitures listed under section 30 are:

(i) Removal and exclusion from any public service, office or employment

The expression ‘any public service, office or employment’ must be understood to mean any duty or work, whether in the public or private sector. ‘Exclusion’ suggests that the offender is denied access to any duty or job; and ‘removal’ conveys the idea of an offender who was employed but is henceforth barred from taking up any job.

(ii) Incapacity to be a juror, assessor, expert referee or sworn expert

This disqualification is of doubtful punitive effect. Being a juror, assessor or expert referee are doubtful privileges about which few people care and in any event the instances in which the law resorts to the services of jurors, assessors and expert referees are extremely rare.¹⁸

(iii) Incapacity to be guardian, curator, deputy guardian or committee (save for the offender's own children), or member of a family council

This disability in connection with certain civil and family rights is nowadays also of doubtful punitive effect.

(iv) Prohibition on wearing any decoration whether national or foreign

One may take leave to doubt that this prohibition has any punitive effect at all. This is not a meaningful disqualification because these days few people attach any importance or significance to wearing a decoration. In this country a decoration has since lost the mark of honour that went with its conferment and most people see it as a metal toy that anyone can always buy from the relevant government department on payment of a fee.

(v) Prohibition on serving in the armed forces

This is a prohibition of doubtful relevance in an age where the military has lost much of its lustre of yesteryears and where serving in the military is no longer considered an honour but an onerous duty especially when that military is serving a discredited and despised regime.

¹⁸ One rare instance is the provision in section 70 of the Southern Cameroons High Court Law 1955 which provides that the High Court may try and hear a civil cause or matter by calling in the aid of one or more assessors. The provision is virtually a dead letter.

(vi) *Prohibition on keeping a school, on teaching in any educational establishment, and, in general, on holding any post connection with the education or care of children*

This in effect is a disqualification from working with children.

These are meaningless forfeitures. The only ones which nowadays present some degree of relevance and have a punitive element are those mentioned in (i) and (vi), both of them having a preventive character as well.

As a general rule, any sentence for felony carries with it all the forfeitures listed in section 30. Thus, a sentence of natural life or of death in effect means the extinction, as regards the convicted offender, of all the civil rights and capacities that are the subject of the forfeitures. When made, a forfeiture order takes effect and remains in force throughout the duration of the sentence and continues for a further period of ten years after release from prison or release on licence not revoked. However, the court may, for reasons which it must record in the judgment, make an order relieving the offender from one or more of the prescribed forfeitures, or reducing the duration of the prescribed forfeitures to not less than two years. This does not apply to an offender sentenced to life or to death commuted to life. For such an offender the sentence automatically carries with it all the prescribed forfeitures without any possibility of relief from any. If a sentence for felony is passed on an accused *in absentia*, an order of forfeiture made by the court takes effect from the date of publication of the prescribed notices.¹⁹

Regarding a sentence for misdemeanour, generally such a sentence does not entail the making of an order of any of the forfeitures prescribed in section 30. However, where the law so authorises, the court may, by a reasoned judgment, impose some or all of the prescribed forfeitures, but for not more than five years.²⁰

Publication of the court's judgment. Where the section creating any particular offence prescribes publication as an ancillary penalty for the offence, the court may, on conviction, order publication of its judgment. The publication lasts for the period of time specified in the judgment. The purpose of publication is to bring the court's decision to the attention of the general public, including the offender himself (particularly if the decision was given *in absentia*). This is usually done by posting the judgment on a notice board at the entrance of the courthouse or at other places deemed necessary by the court, including on the door to the offender's home, if necessary.

¹⁹ Section 32.

²⁰ Section 31(4).

What is usually posted is that part of the court judgment relating to the verdict and the sentence. But the court has discretion to order publication of the entire judgment if it considers it necessary. It may also order publication in such newspaper as it may appoint, the offender being required to defray the expense of doing so. Publication at the behest of the court does not affect the freedom of any media organ to publish, and make a fair comment on, the judgment. The prescribed period during which the judgment remains posted is two months in the case of felony or misdemeanour, and fifteen days in the case of simple offence.²¹

Closure of premises or business organization. The definition of an offence may provide, as one of the penalties upon conviction for that offence, the closure of a business, organisation, or other institution. In that case, the court may, on conviction for the offence, additionally order the closure of any business, industry, or premises used for carrying out a gainful activity, which was an instrument for the commission of the offence.²² The closure of any such business organization or premises necessarily entails a ban on carrying out the same business or industry or activity in the same premises, whether by the offender or by any other to whom he may sell, transfer or let the establishment or premises. However, if the offender is merely the lessee of the premises, the owner is free, unless he was convicted as an accessory, to let the premises to a third party even for the same business activity. The penalty of closure of establishment is not directed at the leased premises *per se*, but only at the offender and his representatives in interest.

Confiscation of property. When an offender is convicted other than for a simple offence the court may, in its discretion, make an order confiscating (or freezing) any property, be it movable or immovable, which was used as an instrument of commission of the offence or which is the proceeds of the offence.²³ An example of property used in committing an offence would be a warehouse used to conceal smuggled goods or a conveyance used for drug trafficking or a bank account used for sponsoring criminal activity. An example of property which is the proceeds of an offence would be a house or land or jewellery or painting or a motor vehicle or an aircraft or a boat bought or an investment made by the offender with the proceeds of stolen money or money corruptly obtained.

²¹ Section 33(1).

²² Section 34.

²³ Section 35; confiscation under this section is an accessory penalty and is different from confiscation as a preventive measure under section 45.

The type of property confiscated is immaterial: it may be movable or immovable, real or personal, tangible or intangible. But the property must 'belong' to the offender and must already have been seized. The term 'belong' has a wider meaning than ownership. It underscores the fact that it is immaterial whether the property is in law or equity that of the offender, and whether it appertains lawfully or not. Property belonging to a person would normally be one which he owns. But such property would also include property in his custody or possession (immediate or mediate), or property that he has as a bailee or a lessee. The requirement that the property must already have been seized means that only property already impounded may be the object of a confiscation order. The court cannot make an order confiscating property which has not yet been identified and impounded but hoping that it would be found and then seized. If the property in question has not yet been impounded, it might well be that the court would have to make a seizure order before making the confiscation order. Confiscation under section 35 amounts to a penalty because it is concerned to remove property already used as an instrumentality of crime or which is the fruit of crime, rather than to bring about the prevention of future harm.

The point is worth making that the Penal Code establishes no scheme for the making of an orders confiscating or freezing the assets of a person when that person has not been convicted. For example, the court cannot make such an order in respect of a drug trafficker, money launderer, white-collar fraudster, Cyber fraudster, and so on, unless the person concerned has been convicted. The court has no power under the Code to make any such order in the absence of a criminal conviction.

Many countries have in place a mandatory procedure for the confiscation of the proceeds of drug trafficking and other forms of crime. These procedures are usually available under particular legislation. The general tenure of such legislation is this. Where an offender has been convicted for a serious offence the judge must, on his own motion or upon application by the prosecuting authority, make an assets-forfeiture order if he believes that it is appropriate to do so. The judge is likely to conclude that making such an order is appropriate if the offender has a criminal lifestyle or if the offender's conviction arises from conduct forming part of a course of criminal activity or if the offender has benefited from the particular criminal conduct in the case. The desirability of depriving criminals of the proceeds of their crime has received international recognition. Such deprivation is believed to be justifiable and necessary in the interest of crime prevention and the fight against corruption.

Assets forfeiture is provided for in the Rome Statute establishing the International Criminal Court, 2002. The Court may order a forfeiture of proceeds, property and assets derived directly or indirectly from any crime within its jurisdiction, without prejudice to the rights of *bona fide* third parties.²⁴ It may request assistance from States Parties, where applicable, in relation to the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crime for the purpose of eventual forfeiture, again without prejudice to the rights of *bona fide* third parties.²⁵ Provisions of the same tenor are to be found in the following regional and worldwide conventions: the European Convention of 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime; the United Nations Convention against Transnational Organised Crime, and the United Nations Convention against Corruption.

Section 2. Preventive Measures

The object of preventive measures is the reduction of the risk of threatened offending and the risk of reoffending. These measures are conceived not as a form of punishment. They are seen as measures designed to help towards the offender's reformation and as society's defensive tools aimed at reducing the risk of possible offending or reoffending. They tend to be imposed when the objective in view is re-education, reformation and treatability.

The Code makes provision for two types of preventive measures. One type consists of measures that may be imposed even when the person concerned has committed no offence. Such measures may be described as ante-penal preventive measures. Their purpose is to prevent identified risks of offending. The other type of preventive measures are those measures that may only be imposed following a conviction and may be described as post-penal preventive measures. They are designed to remove conditions or circumstances likely to tempt the offender to relapse into criminality. The court may or must pronounce these measures when sentencing a convicted offender.²⁶

²⁴ Article 77(2)(b) of the Rome Statute establishing the International Criminal Court.

²⁵ Article 93(1)(k), Rome Statute.

²⁶ Sections 36 to 39, Penal Code.

§1. Ante-penal preventive measures

There are two ante-penal preventive measures that may be imposed: recognizance, and confinement in a special health facility.

Recognizance. The legal institution of recognizance is an anticipatory measure imposed so as to reduce the risk of repetition of an offence, or to reduce the risk of an offence merely threatened. In relation to other preventive measures, the recognizance is *sui generis* because it is imposed, regarding an adult, without any offence having yet been committed. Imposing a criminal measure on a person who has so far committed no offence is rather surprising because it would seem in breach of an elementary rule in criminal law which is that a person may only be the subject of a penalty or measure if he is found to have committed an offence. However, the concept of recognizance seems consistent with crime prevention and public protection. From the perspective of the public, the recognizance, analytically, serves the same purpose as the concept of anticipatory self-defence.

The institution of recognizance under the Code combines the English law old system of binding over a person who has so far committed no offence, and the Italian law security for good behaviour which may be invoked only after an offence has been committed. Under the Penal Code, where it is clear from the utterances of a person that he intends to commit an offence against public peace, the court may require him to enter into a recognizance to refrain from committing any such offence. This aspect of the recognizance fulfils the same function as the old binding over under English law. Its purpose in this instance is the same as the other preventive measures. But unlike others, a person may be required to enter into a recognizance when he has not yet committed any offence. However, for this measure to apply the behaviour of the person should have exhibited an unambiguous intention to commit an offence that disturbs the public peace. By s. 46(1),

“Any person who by his conduct or by his utterances shall have exhibited an unambiguous intention to commit an offence which may disturb the public peace may be required by the President of the district court to enter into a recognizance with or without solvent sureties in such sum as may be therein fixed to refrain from commission of any offence of the like nature for the duration of the period therein specified.”

The essence of a recognizance in relation to an adult, is thus an undertaking by him to pay a determined sum of money should he fail to refrain, for the duration of a specified period, from committing a threatened

offence against public peace. The sum is fixed having regard to the resources of the person bound over. Ordinarily, the time bound over may not exceed one year. But in the case of a habitual offender, the time may be extended to three years. The recognizance may or may not be supported by solvent sureties. The conditions of the recognizance are fixed by the presiding magistrate. The magistrate would take care not to impose conditions which the person to be bound over cannot fulfil. Where a person required to enter into a recognizance does not do so, or fails to find the sureties required, he may be immediately imprisoned (for contempt of court²⁷, since the Code creates no offence of failing to find sureties for a recognizance or failing to enter into a recognizance) until he complies, though the term of imprisonment may not exceed that of the recognizance.

Under the Code also, where a child has committed an offence, his parent or other person who has care and custody of him may be bound over for a year to ensure that he does not reoffend. In terms of section 48 of the Code, parents or other persons responsible for children under 18 years of age may be bound over for one year where the minor under their care has committed an offence. Such parents or guardians must take all reasonable steps to see that the minor does not commit an offence. The obligation of the parents is one of means and not one of result. This aspect of recognizance, which the Penal Code makes provision for in relation to a child, comes from the Italian law security for good behaviour. It is a peculiar type of measure because it applies to persons who have not yet attained the age of criminal responsibility. On principle, such persons may not be convicted and therefore cannot be the subject of principal and accessory penalties.

Confinement in a special health facility. An order for confinement in a special health institution may be made under section 43 even though the person concerned has not committed or not threatened to commit any offence; provided, however, that the person is a dangerous lunatic, or is partially insane, or is a drug addict. Persons suffering from any of these disabilities are confined for purposes of treatment and rehabilitation.

²⁷ A person is in contempt of court if he intentionally disobeys or disregards a court order, or is guilty of misconduct in a court. Contempt of court thus consists of conduct which interferes with the administration of justice or impedes or perverts the course of justice. It may be civil or criminal. Civil contempt consists of a failure to comply with a judgment or order of a court or the breach of an undertaking to the court. Whilst being termed civil contempt, the offence is criminal in nature. Criminal contempt is a wider concept and covers activities inside the court (contempt *sedente curia*, i.e., during the sitting of the court) as well as activities outside the court (contempt *ex facie curia*, i.e., from the face of the court). Such contempt may take the form of interrupting court proceedings, refusing to answer questions before a court without lawful excuse or scandalizing the court.

§2. Post-penal preventive measures

The various types of post-penal preventive measures that may be imposed are: ban on occupation, preventive confinement, post-penal supervision and assistance, confinement in a special health institution, confiscation²⁸, and recognizance²⁹ which is a preventive measure *sui generis*.

Ban on pursuing an occupation. There may be serious apprehension that an ex-convict, if allowed to continue to ply his trade, may repeat the same crime for which he was convicted. In that case, he may be prohibited from engaging in that particular profession or business or employment or occupation for a period of between three and five years reckoned from when he would have served out the principal sentence. Section 36 provides:

“Upon conviction for a felony or misdemeanour under the ordinary law, the court may, for reasons to be recorded in the judgment, forbid the offender to continue to follow any occupation found to stand in a direct relation to the offence, and his continuation in which would give grave reason to apprehend a repetition.”

On subsequent conviction the prohibition on pursuing that particular employment or business or profession may be for life.³⁰ The objective of this measure is to avoid, in the interest of the offender, temptation to crime.

Preventive confinement of persistent offenders. Preventive detention is defined in s. 37 as “confinement for from five to twenty years under a programme of work and social reformation, during which the offender shall, in default of a separate establishment, be confined separately from convicts serving a sentence of imprisonment.” This confinement of a persistent offender is a custodial measure in the public interest with an objective that leans more towards corrective training. Banned occupation (i.e., disqualification from employment) appears as a preventive measure devised in the interest of the offender. Preventive confinement, by contrast, is seen as an answer to the need to protect the public from the depredation of confirmed criminals even if the offence has not in itself deserved a long prison term.

²⁸ Section 20.

²⁹ Sections 46-50.

³⁰ Perversely, the ban on occupation may mean that the ex-convict is forbidden from taking up the only occupation for which he has skills and expertise e.g. as a banker or as a tradesman.

Preventive confinement is practically executed in the ordinary prisons in the same manner as imprisonment.

In theory, the need to protect the public must be reconciled with the other desiderata – reforming the offender and his eventual integration into society. Scant regard is paid to the interest of the offender. Any person who within the space of ten years, has been convicted for felony or misdemeanour for a number of times and under certain conditions specified in section 39, may be sentenced to preventive confinement. However, such a sentence may not be passed on a person who would be aged less than 25 or more than 60 years at the expiry of his principal sentence.³¹

Supervising and assisting offenders jailed for more than a year. Post-penal supervision and assistance is a flexible measure aimed at re-integration and re-socialisation of the offender. Every offender sentenced to loss of liberty for more than a year may, where the circumstances warrant and for reasons to be recorded in the judgment, be subjected by the court for up to five years to post-penal supervision and assistance, consisting of general obligations and, in a fit case, of added special obligations.³² The key elements of this institution are supervision of the offender after he has served his sentence ('post-penal *supervision*') and assistance to the offender after he has served his sentence ('post-penal *assistance*'). The supervision and assistance take the form of subjecting the person to certain general and special obligations.

The general obligations include the requirement that the person resides in a particular place, that the person gives the supervisor information on his means of support, that the person gives the supervisor information in advance of any change of employment or absence of over two weeks.³³ The special obligations are many and include obligations to take up residence in one or more specified places, to remain in employment or follow a course of instruction, to submit to measures of control or treatment, not to wager, not to drive any class of vehicle, to avoid the company of specified offenders, to abstain from undue consumption of alcohol, and so on.³⁴

Confinement of persons suffering from mental illness. Dangerous lunatics, the partially insane, and drug addicts may be confined in a health institution³⁵. An order of confinement in a special health institution may be

³¹ Section 38.

³² Section 40.

³³ Section 41.

³⁴ Section 42.

³⁵ Cf. the hospital order in England, a custodial measure in the public interest.

made in respect of an insane person, a person who is partially insane or a drug or alcohol addict acquitted of a criminal charge on grounds of unsoundness of mind. This is a custodial measure in the nature of a hospital order made in the public interest. This measure is of doubtful utility in the light of the serious deficit of specialists in the fields of psychiatrists and psychology.

Confiscation of any property linked to the commission of an offence.

Confiscation under section 45 is compulsory where anything whose manufacture, custody, sale or use is unlawful. It is immaterial that the thing does not belong to the offender or, that the criminal proceeding does not result in conviction, provided the alleged acts were committed. The purpose of confiscation is to deprive the offender of the fruit of his crime and to drive home the message that criminality does not pay.

As in the case of principal and accessory penalties, these preventive measures are imposed only following a conviction or, at least, that the alleged unlawful act took place. Even in the case of a person of unsound mind, the court must, notwithstanding the provisions of section 43, be satisfied that the lunatic in fact committed the acts he is accused of. However, although these preventive measures are pronounced at the same time as penalties, they take effect only after the principal penalty has been served out or when the principal penalty is suspended.

Sentencing: Judicial Discretion and Decision

A sentence is any measure pronounced by a criminal court against a person convicted of an offence and which finalises the trial. Sentencing is thus the imposition by the court of punishment (a penalty) on a convicted offender. The wages of crime is punishment. In the law of criminal procedure the court pronounces punishment only after conviction. Conviction is a public condemnation of the criminal conduct in question. When a court convicts it must proceed to pass sentence. "Sentencing is an institution for the expression of social values as well as an instrumental means to a clinical pathological end."¹ At an operational level, sentencing is largely a matter of policy and at this post-conviction stage of the trial proceedings the judge turns administrator.

The immediate purpose of sentencing is the punishment of offenders. In determining punishment the court takes into account the seriousness of the offence committed; the culpability of the offender in committing the offence; and any harm which the offence caused, was intended to cause, or might foreseeably have caused. Other but remote purposes of sentencing include the reduction of crime, the reform and rehabilitation of the offender, and the protection of the public. A recent purpose of sentencing that developed towards the end of the last century and has now strongly come to the fore is the making of reparation by offenders to persons affected by their offences. A number of discrete principles, such as respect for human rights, equality of all before the law, and human dignity may also impinge on sentencing decisions.

Section 1. Discretionary decision-making in the criminal process

When the court convicts an offender, it proceeds to sentence him there and then or it defers sentencing for another sitting of the court (*curia advisari vult*). The sentencing stage is the last of several stages at which decisions are taken in a criminal process. Well before this stage, there is the decision to report a crime and the decision to arrest the suspect, if he is identified, and if

¹ Ashworth A, *Sentencing and Criminal Justice*, 4th ed., Cambridge, Cambridge University Press, 2005, p. 91. On sentencing generally, see also Boyle K & Allen M, *Sentencing Law and Practice*, Sweet & Maxwell, London, 1986 ; Walker, *Sentencing – Theory, Law and Practice*, Butterworths, London, 1985.

not, to investigate the crime and then arrest the suspect. This is followed by the decision to prosecute the suspect. Finally, there is the decision to convict the defendant based on the evidence adduced in court.

Prominent at these various stages of the criminal process is discretion. The police exercise discretion regarding investigation and arrest. The prosecuting authority exercises discretion whether to prosecute or not, whether to withdraw a charge, and whether to stop the prosecution altogether. The court exercises discretion when it comes to sentencing. The many and varied elements that are relevant to these decisions tell in favour of discretionary decision-making. This is true of sentencing to a certain extent, but less true of prosecution decisions.² The advantage of discretion is that it brings flexibility to respond to different combinations of facts, especially if discretion is structured to ensure that it is exercised broadly in line with some coherent policies. However, the disadvantage of discretion is that it may allow the individual views of the decision-maker to influence deliberately or otherwise the approach taken.

§1. Prosecutorial discretion

Prosecutors take decisions on initial charge. In doing so, they exercise a discretion which is not ‘regulated’ by any prosecutorial ‘guidelines’. However, they do decide whether the evidence is sufficient to warrant a prosecution and whether prosecution would be in the public interest. They are unlikely to institute criminal proceedings if there is no realistic prospect of conviction. They are also unlikely to waste time and resources on a flimsy or petty case. Beyond this, there are no approved charging standards designed to prevent or at least reduce what may be regarded as some questionable prosecution practices.

The governing principle in all prosecutions is that of expediency or advisability. There are no guidelines on decisions declining to prosecute or discontinuing a case already begun. There is no requirement to give reasons for any such decision. Since all prosecutions in this country are governed by the principle of advisability and not by the principle of compulsory

² Prosecutions in this country are governed by the principle of expediency and not by the rule of compulsory prosecution. The prosecuting authority may *withdraw* a charge before the accused has pleaded to it. Also, it may at any time after the accused has pleaded, but before conviction, *stop* the prosecution in respect of a charge by entering a *nolle prosequi*. That does not mean the prosecuting authority is a free agent in this matter. That authority is supervised and controlled by the Minister responsible for Justice who may direct the prosecution or non-prosecution of any case, even if the prosecuting authority thinks otherwise. Moreover, generally, the prosecuting authority is required to prosecute a case where there is a factual basis and enough evidence for it.

prosecution, the prosecuting authority exercises complete discretion (subject only to the episodic control of the Minister for Justice) whether or not to prefer a charge and whether or not to charge a more or a less serious offence in particular circumstances. The justification for this wide prosecutorial discretion appears to be that the prosecuting authority “may be prompted by considerations which lie outside the competence of the courts to questions.”³

§2. ‘Dubious’ prosecution practices

One or two somewhat ‘dubious’ prosecution practices may be mentioned. As a matter of judicial practice (backed by no legislative authority) there is a discount for pleading guilty. Mindful of this fact, a prosecutor might be tempted to over-charge a case in the hope of inducing a ‘bargain’ whereby the defendant agrees to plead guilty to a lesser offence, which may be the offence that should have been charged originally. Or, the prosecutor might simply suggest to the defendant that he will not ask for a stiff sentence if he makes a guilty plea. The suggestion induces the defendant to make a guilty plea in court in the hope of getting off with a lighter sentence. On the other hand, a case may be under-charged in order to have it tried in the Magistrates’ Court and disposed of summarily in order, for example, to give the defendant an early taste of prison.

There is apparently another practice the prosecuting authority may resort to. Where there are multiple indictments or multiple counts in an indictment the accused may decide that he will plead guilty to some and not guilty to others. In that case the prosecution may then decide that the guilty plea on some of the charges generally settles the matter and that it would be a waste of the court’s time and resources to try the charges to which the accused pleads not guilty. In court the prosecution may apply for an order that the charges to which the accused pleaded not guilty be allowed to lie in the case file.⁴ Those charges may then not be proceeded with without leave of the court. The court would grant the order if it is satisfied with the reasons given by the prosecutor. The order is not necessarily conclusive of the case against the accused and may be revived if, for instance, the conviction on the charges to which the accused pleaded guilty is quashed on appeal. Such an order made by the court in the criminal proceedings is somewhat analogous to an adjournment *sine die* as applied in civil proceedings.

It is not known how often these practices occur, if at all. But they show that factors other than the intrinsic seriousness of the case could determine the

³ Per Thomas, CJ in *The People v Anyuchili Tandafor* (1971-1973) UYLR 136 at p. 139.

⁴ This is somewhat the equivalent of the French *classement sans suite*.

charge brought and the way in which the evidence is presented. Also, the prosecutor's choice of a charge determines the court in which it would be tried and this may have a considerable effect on the sentence likely to be passed.

Section 2. Source of sentencing law

The primary source of sentencing law is legislation. In many instances, this source is supplemented by sentencing guidelines set out by the executive and/or the higher judiciary.

§1. Legislation

The principal source of sentencing law is legislation. Sections 17-73 and 88-93 of the Penal Code set out what might loosely be referred to as the sentencing law in this country. The aim of sentencing under the Code is, broadly speaking, to ensure punishment of the offender and protection of the public. The court is enjoined always to bear this in mind when it comes to sentencing. Sentencing is done by the same court which tries the offender, so that when the court convicts it proceeds to pass sentence or it defers sentencing to a later date.

Deciding how much to impose as appropriate sentence is an agonising process in which conflicting aspirations exist. The education, training and experience of the judge as well as the input of a court psychologist or social worker (if any) can be expected to help him in making his sentencing decision. But this is not always the case. The Code gives the judge a wide variety of penalties, a wide sentencing penalty range, and a wide variety of preventive measures. When it comes to deciding on a particular penalty, on fixing the length of a prison sentence, on determining the amount of a fine to be paid, or on choosing a preventive measure the judge exercises his judicial sentencing discretion within these ranges and fixes a sentence which he reasonably believes fits both the crime and the criminal. But beyond that, the Code provides little help in getting the judge out of the sentencing dilemma. It would seem that more often than not the judge simply goes by rule of thumb.

All that may be said is that before passing sentence, the judge must direct his mind to certain dominant considerations relating to sentencing. First, he has to decide on the objective to be achieved by imposing the sentence he is minded to. Is it punishment or public protection? Sentencing is not explicable on any one theory of punishment. The behaviour of the court is justified by every aim taken together. Even if it were possible to justify punishment on any single rationale, it would be absurd justice to apply a particular penalty indiscriminately to all categories of offenders. Second, after he has made up

his mind on this matter, the judge then has to select and fix the appropriate sentence to pass, which may take the form of a penalty or a measure or both. Finally, sentencing technique requires the judge to specify the manner in which sentences are to be carried out (concurrently or consecutively) and, in the case of a death sentence, whether the mode of execution is to be by hanging or by firing squad.

Unfortunately, there is no coherent sentencing structure in this country. No circulars or guidelines have been promulgated to assist in this regard and to ensure that judicial discretion is exercised along right lines. Sections 17-73 and 88-93 of the Penal Code merely set out the court's sentencing powers and the different penalties available to the court. There is, for example, no requirement in the Code that in passing sentence the court must take into account the interests and needs of the victim of crime.

§2. Guideline judgments

There are no judicially-created principles of sentencing in this country. However, certain guideline judgments by some Commonwealth appellate courts are followed. Thus, where a sentence is unduly lenient the prosecuting authority may appeal against it.⁵ In such a case the Court has the power to increase the sentence if it concludes that it is appropriate to do so. Commonwealth appeal courts have from time to time used the occasion of an appeal against sentence as an opportunity to lay down guideline sentences. Drawing inspiration from these courts⁶, the courts here follow certain established procedural principles and sentencing guidelines either as good practice or as persuasive authority. One such guideline is that the maximum sentence should be reserved for the worst possible case.⁷ Another is that the court should only alter a sentence if it is wrong in principle⁸, so that a sentence will only be increased if it is outside the proper limits of a judge's discretion.⁹ Still another principle is that an appellate court should be slow to disturb

⁵ Section 84 of the Magistrates' Court (Southern Cameroons) Law 1955 provides that, "Where an accused person has been acquitted or an order of dismissal made by a magistrate, the prosecutor may appeal to the appeal court from such acquittal or dismissal on the ground that it is erroneous in law or that the proceedings or any part thereof were in excess of the jurisdiction of the magistrate." Section 81 of the same Law provides that, "An appeal shall not operate as a stay of execution but the court below or the appeal court may order a stay of execution either unconditionally or upon the performance of such conditions as may be imposed in accordance with rules of court made under the provisions of this Law or of any other written law." See also, Criminal Procedure Ordinance/Code.

⁶ In particular, the Court of Appeal and the House of Lords in Britain, the former West African Court of Appeal, and the Nigerian Supreme Court.

⁷ *Harrison* (1909) 2 Cr App R 94.

⁸ *Gumbs* (1926) 19 Cr App R 74.

⁹ *Attorney General's Reference No. 7 of 1989 (Thornton)*(1990) 12 Cr App R (s) 1.

findings of fact made by the trial court.¹⁰ These are guideline judgments couched in narrative form. The precedent value on sentencing of these judicial procedural principles and guidelines varies considerably.

Section 3. Rules governing sentencing decision

Sentencing is a judicial responsibility; that of the trial court which, in this country, is normally a single-judge court. The judge's sentencing discretion is subject to limits and controls. Section 93 enunciates the general rule governing judicial sentencing decision. It provides:

“Sentence of penalty or measure shall vary, within such limits as may be prescribed or authorized by law according to the circumstances of the offence and to the public danger which it may present, to the circumstances of the offender and to the likelihood of his reformation, and to the practical means of carrying it out.”

This section lays down three basic sentencing guidelines for the trial judge when selecting sentence. First, the sentence to be passed must be within the limits prescribed by law. It must be a lawful sentence. If the sentence passed by the court does not fall within the legally prescribed limits then it is an unlawful sentence and cannot stand. Similarly, if the sentence is not provided by law then it is an unlawful sentence for, in terms of section 17, no penalty or measure may be imposed unless provided by law, and except in respect of an offence lawfully defined.

Secondly, the phrase “according to the circumstances of the offence and to the public danger which it may represent” means that the severity of the sentence must depend on the nature of the offence – the circumstances of the particular offence and the dangerous nature of the offence in general. The sentence must be commensurate with the crime committed, in other words, it must be proportionate to the offence.

Thirdly, the sentence must be individualised, that is, tailored to the particular circumstances of the offender: his financial situation, his family circumstance¹¹, his personal character, his age, the likelihood of his

¹⁰ Delivering the unanimous judgment of the West Cameroon Court of Appeal in *Emmanuel Ebot Tabe v The People* (1968-1970) UYLR 121, O'Brien Quinn, J recalled that the Court has “on more than one occasion said that it is not its practice to interfere with sentences passed in lower courts unless they are manifestly excessive or are wrong in principle.”

¹¹ In *The People v Charles Kebbi* (1983) (alias *BICIC Forgery Case*), Cameroon Outlook, 29 April 1983, p. 12, defence counsel strongly urged the Victoria Magistrate's Court to consider

reformation, and the practical means of carrying out the sentence. For example, there is no point sentencing an offender to say a borstal school or to a specialised health institution such as a detoxification centre, or to be subject to supervision by a probation officer, if none exists. Further, an offender may commit say an economic or financial offence after deliberately discounting the risks he runs and after considering that the profit derivable from the offence outweighs the disadvantage of the punishment which he probably would and does get. The court would take this psychological consideration into account and lean towards passing a long sentence so as to deprive the offender of enjoyment of the fruits of his crime. The court may go further and order, under section 35(1), the confiscation of the proceeds of the crime. On the other hand, the fact that the offender is a family man with so many dependants and that he had never committed any crime before and therefore stands a good chance of not reoffending, may all tell in his favour warranting a lenient sentence.

These three basic guidelines will now be considered in some detail.

§1. Sentence must be lawful

The principle of legality ordains that there should be no crime without a law making it so, and no punishment except within the confines defined by law. It follows that the judge can neither invent nor apply any penalty or measure not provided by law; nor can he go below the statutory minimum or above the statutory maximum. The Code prescribes two sentencing techniques: the system of minimum and maximum sentences, and the system of monetary fines as alternative or supplemental penalties.

Statutory minima and maxima penalties. In some jurisdictions, the law prescribes only the maximum punishment for each offence, leaving it to the trial judge to fix at his discretion a sentence varying from an absolute discharge to the statutory maximum. In those jurisdictions, sentence is at large, so to speak. There, except for the matter of consistency in sentencing, this has raised no serious concerns because only mature and experienced law professionals are appointed to the bench. By contrast, there are jurisdictions, as is the case here, where the judiciary is a mere civil service and new entrants

as mitigating circumstances the fact that the offender was a young man married with five children and the guardian of his brother's children, the fact that he was at the time the highest qualified national recruited by his employer, a foreign bank, the fact that his employment had already been terminated, and the fact that he was "tempted by circumstances beyond his control". The court was moved by counsel's plea in mitigation and tempered justice with mercy by passing a lenient sentence.

find themselves very quickly on the bench. In this country judicial independence is largely theoretical and the judiciary lacks pomp and circumstance.¹² In a judiciary such as this one there can be no question of “the infallible wisdom of the Bench”. This explains the wisdom of the law in fixing both the minimum and the maximum penalty for each offence.

However, this has fettered only to a limited extent the sentencing discretion of the trial judge. To begin with, within the two poles of penalty specified by statute for each particular offence, the trial judge has an almost free hand to decide what the actual sentence should be. Further, the maximum penalty provided by law is generally illusory as a safeguard to liberty. This is so because where there is an aggravation of responsibility or in the case of sentence to consecutive terms of imprisonment or to cumulative fines, the maximum sentence may be fantastically high. Further still, the minimum penalty provided by law for each particular offence generally proves illusory as well because of the inter-play of mitigating circumstances and the principle of individualisation of punishment.

The overall result is that judicial discretion in sentencing is much wider than might at first be thought. This result is not to be regretted because any statutory scheme of penalties that imposes a real restriction upon the discretion of the judge would be inconsistent with the notion of individualisation of punishment. The judge may take aggravating circumstances into account and pass a sentence that exceeds the stipulated maximum for the particular offence. He may take mitigating circumstances into account and so pass a sentence that is way below the prescribed minimum for the particular offence. In either case, the sentence is not illegal since the trial judge is simply using powers conferred upon him by the law on sentencing.

It is not to be thought that because the judge has discretion in sentencing his fixing of the length of a prison sentence or the amount of a fine is arbitrary and depends entirely on his own preference in the matter. The breadth of his discretion is limited by the requirement that he must be mindful of the moral wickedness of the offence, its danger to the public, the circumstances of the offender, the particular degree of iniquity and dangerousness evinced by the offender, and the practical means of carrying out the sentence. Another limitation on judicial sentencing power is that mandatory penalties are provided for some offences. For example, the death penalty, a very

¹² Anyangwe C, *The Magistracy and the Bar in Cameroon*, CEPER, Yaoundé, 1983. By the very nature of their calling judges are ideally persons who seek to acquire honour, not fame or wealth. But given a choice between honour and wealth, not a few judges in this country would opt for wealth.

controversial form of punishment in this day and age, is mandatory for capital murder, for parricide, treason, secession in time of war, civil war, and, until some years back, for aggravated theft. Life imprisonment is mandatory for ordinary murder, for forging the Seal of the State, forging a security deposit, attempted coup d'état, armed band, and secession in peace time.

A further limitation on the judge's sentencing discretion arises from the fact that for some offences (e.g. misappropriation of public funds, bad cheques, etc) the law forbids the judge to pass a sentence that is below the prescribed minimum even upon a finding of mitigating factors in favour of the convicted offender. The prohibition is usually couched in these terms: "Upon a finding of mitigating circumstances, the sentence imposed may not be less than x years and suspension of sentence may not be granted." Another limitation on the trial judge's discretion in passing sentence is to be found in the power of the Court of Appeal to review an illegal or excessive sentence. Furthermore, the power of courts to determine the fate of offenders is affected by the power of the executive to remit sentences through pardon and early release on licence, as well as the power of the legislature to grant amnesty expunging a conviction. Thus, the judge may sometimes deliberately set a penalty high in order to compensate for the chance that the offender may be granted remission of sentence. This practice is of course to be deprecated.

The real restriction placed by the principle of legality on the judge's sentencing discretion lies in the fact that the judge cannot inflict any penalty or measure that is not provided by law. He cannot invent and enforce his own penalty. He cannot, for example, pass a sentence of amputation, whipping, deportation, banishment, sterilization or castration, imprisonment in chains, execution by electrocution or poisoning or decapitation, or payment of a fine in kind because these forms of punishment are not authorised by the criminal law of this country. Similarly, the trial judge cannot in respect of one offence, inflict a penalty or measure provided for another offence. Again, these limitations on judicial sentencing discretion are not to be regretted. The purpose of the limitations is clearly to ensure and promote a uniform and coherent sentencing system throughout the country. Without these minimum guidelines and limitations, great disparities would develop in sentences meted out in roughly equal situations and circumstances by the judges in various parts of the country or even within one judicial division.

Many live issues in the sentencing field raise questions of a constitutional nature.¹³ To what extent does sentencing policy belong to the judiciary? Are

¹³ Ashworth A, *Sentencing and Criminal Justice*, 4th ed., Cambridge, Cambridge University Press, 2005, pp.50 *et seq.*

there any limits beyond which the legislature may not go when legislating on sentencing? What are the limits beyond which the executive may not go in determining how a sentence may be carried out?

Sometimes the principle of judicial independence has been brought into the debate. But, as Ashworth points out, the true meaning of that principle is that when passing sentence in each case, a judge or magistrate should be in a position to administer the law without fear or favour, affection or ill-will.¹⁴ No pressure upon the court to decide one way or the other should be countenanced. Discretion should not be exercised on personal, political, ethnic or other illegitimate grounds. Discretion should be an exercise of judgment according to legal principle. Appointments to the bench should not be politically motivated. Judges in the discharge of their functions should not be under executive or political control. Freedom from bias, from partiality and from undue influence is integral to any definition and operation of the rule of law. Nevertheless, not a few people would readily argue that in this country judges are tightly restricted and that they are un-avowed political appointees influenced by party political considerations and under executive control and, therefore, expected to follow approved paths. Many would also argue that most court decisions are not given without fear or favour or ill-will.

The matter of the constitutionality of constraining judicial sentencing discretion is a moot question in this country because constitutional litigation is virtually unknown. Quite apart from the Penal Code, a number of particular statutes and burgeoning legislation create a multiplicity of separate offences and also provide for separate maximum and minimum sentences. However, the various sentences and orders which a court may make after conviction and the various restrictions it may impose in certain circumstances are all specified in the Penal Code, which is a particular piece of legislation. It is therefore legislation that provides sentencing powers and sets lower and outer limits to sentences that may be passed. Within the minimum and maximum sentence the Court exercises a somewhat restricted discretion. There has been no attempt by the courts themselves at a gradual accretion of sentencing decisions.

The question may be asked whether it is desirable to restrict the judge's sentencing discretion by imposing maxima and minima sentences. If the matter of judicial discretion is a constitutional one, then it is one that is not based on the principle of 'judicial independence' since parliament has power under the constitution to prescribe penalties. In the exercise of that power

¹⁴ *Idem.*

parliament cannot be said to infringe the constitutional independence of the judges. It seems the matter of judicial discretion is a policy issue, not a constitutional question. In the widest sense, it is a political question – a question of what is beneficial for the country. Legislation may require a court to impose a specific penalty on conviction for a particular offence. There are circumstances which may warrant the imposition on the court of a duty to do so and parliament may choose to impose such a duty on the courts, denying them in the specific circumstances, as already mentioned, discretion as to sentencing. The court must then obey the statute in this regard, assuming the statute is valid in other respects. It is therefore submitted that it is not a breach of the constitution to deny discretion to the court as to the penalty to be imposed.

The legislature has superior authority to the courts. If parliament passes legislation, the courts must apply it. The subordination of courts to the legislature is correct. The judicial branch is the weakest branch of the governmental *troika*. But this does not mean that the judiciary should not develop policy on matters not covered by legislation. In the view of some commentators, if the judiciary were to take upon itself the task of formulating principles of sentencing it would be assuming a power which the constitution does not give it. Ashworth correctly observes that this view is only trivially true. The constitution in this country gives to the legislature the power to create offences and to determine penalties in respect of all major offences (felonies and misdemeanours). It gives to the executive the power to create regulatory offences and to fix the penalties incurred mindful of the maximum penalty prescribed for simple offences by the legislature. Since the courts are subordinate to the legislature in this respect, it follows that any policy-making function delegated or simply left to the courts can be taken back by parliament. It is a different matter altogether if the legislature purports to pass a law that mandates a certain sentence for a particular individual. Such legislation may be held invalid on a number of grounds. It would be invalid because it goes against one of the basic characteristics of law as a general and impersonal norm. It would also be invalid because it violates the principle of separation of powers by requiring the courts to act as if at the behest of the executive. It would, further, undermine public confidence in the administration of justice.

The place of sentencing in the doctrine of separation of powers as a constitutional principle is unclear. The legislature has control over sentencing powers and policies, subject to international human rights law. The judiciary deals with the application to individual offenders of sentencing law and principles. The executive is responsible for carrying out the sentences

imposed. If anything, the separation of powers doctrine seems to confirm that parliament has considerable authority over sentencing policy, subject to human rights law and subject to the basic limitation that the legislature cannot prescribe a sentence for a particular offender. While the judiciary retains the power to deal with individual offenders, the legislature can and does regulate and restrict by statute sentencing powers, even to the extent of requiring the imposition of mandatory minimum or maximum sentences. There can be no serious objection to that so long as there is no violation of the rights of offenders under applicable human rights treaties; so long as there is no violation of the provision that sentencing decisions require an 'independent and impartial tribunal'.

Monetary fine as alternative or supplemental penalty. There exists another technique of prescribing penalties under the Code and which still makes some margin of discretion available to the judge. This is the technique of alternative penalties allowing for either a fine or a term of imprisonment or for both such imprisonment and fine. The fines are laid down by statute and ordinarily are provided as an alternative or a supplemental punishment even with regard to some serious offences.

Where the law provides for a fine as an alternative penalty, the judge fixes the amount to be paid and in theory presents the convicted offender with two alternative penalties, the length of imprisonment or the amount of fine, for him to choose one. For example, the judge may pass the following sentence: "two years' imprisonment or a fine of 300 000 francs". Theoretically, it is then for the convicted offender to choose whether to go to jail for two years or to pay the amount of the fine and avoid jail. In reality, the sentencing practice is that the judge determines not only the quantum of punishment but also selects which of the two alternatives to inflict on the offender, depending on whether or not he wants the convicted offender to have a taste of prison. This practice may be criticised on the ground that it does not conduce to individual liberty and that it largely sacrifices personal freedom at the altar of societal protection. But at the end of the day it is of no legal consequence whether the penalty of a jail term or the alternative of a fine is chosen by the judge himself or the convicted offender because in the eyes of the law either of the prescribed penalties is deemed appropriate punishment for the offence committed. However, a practice of electing to impose, in appropriate cases, a fine rather than a custodial sentence might be a creative way of facing the acute crisis of overcrowding in the prisons.

§2. Sentence must be proportionate

In terms of section 93, sentence must “vary ... according to the circumstances of the offence and to the danger which it may represent, to the circumstances of the offender and to the likelihood of his reformation.” What this means is that sentence must be a function of the stated circumstances. There is no one-sentence-fits-all for every offender convicted of even the same type of offence. The sentence must vary, that is, must change in accordance with the enumerated variables. In the language of sentencing law, sentence must be proportionate; proportionate to the crime committed (circumstances and dangerousness of the offence) and proportionate to the offender’s moral guilt (his situation in life and the chances of his reformation). The Penal Code thus adopts largely an offence-based system of sentencing (harm plus culpability). In calculating the severity of the sentence to be inflicted, however, this is diluted by incorporating the offender’s history. Both the offence and the offender are taken into account so that the sentence fits the crime and the particular circumstances of the offender.

“Thus, it is wrong to increase the sentence because the accused has insisted on pleading not guilty or has conducted his defence in a particular way; but the sentence may be reduced on the ground that he pleaded guilty. The sentence may be reduced because D informed against his co-prisoner; it should not be increased because D did not inform. D’s good record may be a ground for mitigating the sentence; but his bad record may not be allowed to aggravate it. A fine may be diminished because of D’s poverty; but it may not be increased because of his wealth.”¹⁵

Proportionate to the offence committed. The retributive theory of punishment finds expression in the requirement that sentence must be proportionate to the offence committed. The court must consider the harm which the offence has done to society. But the Penal Code has no explicit requirement that harm done to the victim of the offence should be taken into account. The principle of proportionality at once suggests that the values in society which the law seeks to protect are measurable and gradable to produce a scale of permissible punishment varying from death to a mere fine. For example, the Penal Code adopts in descending order of magnitude the following classification of protected values: offences against the state, offences against the general interest, offences against private interests, and summary offences.

¹⁵ Smith & Hogan, *Criminal Law*, 3rd ed., Butterworths, London, 1973, p.10, see also, 7th ed., 1992, pp. 7-8.

It follows from this scheme of protected values that so-called state interest is ranked higher than the general interest and individual interest. Offences against 'state interests' come before those of general and private interests and tend to carry heavier penalties. This classification may be criticised as illegitimate and reflective of a severe autocratic dispensation¹⁶ that glorifies an abstraction, the state, and puts a higher premium on it than on the human person. Napoleon Bonaparte, Hitler, Mussolini, Stalin, Pol Pot, Pinochet etc. did just that and the world knows where that led to. The state is a human creation and without human beings there can be no state. Acts punished as offences against the state are in fact, for the most part, political offences. And political offences are essentially crimes that seek to protect a regime and its leaders, and the political order of the day.

The importance attached to any particular value in society is reflected in the sanction prescribed for its infringement. The more important the value that is protected the greater the punishment for its transgression. Firstly, the general principle that punishment be tailored to the crime is given expression in section 21 of the Penal Code which classifies all crimes, depending on the penalty prescribed for each, into felonies, misdemeanours and simple offences. Felonies are crimes punishable by death or with a custodial sentence exceeding ten years. Misdemeanours are punishable with a custodial sentence of from 10 days to 10 years and a fine of more than CFA25 000 francs. Simple offences are minor crimes which carry a custodial sentence of not more than 10 days or a fine not exceeding CFA25 000 francs.

Secondly, offences against the state and offences against the general interest carry heavier penalties than similar or comparable offences against private interests. For example stealing from the state (known in legalese as 'misappropriation of public funds') is punished more severely (maximum penalty is life imprisonment) than stealing from an individual (maximum penalty is ten years imprisonment and, in the case of aggravated theft, twenty years). This is so irrespective of the amount involved. Similarly, 'arson and destruction' being an offence against the general interest (i.e. an offence against public safety) is punished more severely (maximum penalty is 10 years' imprisonment) than destruction (maximum penalty is 3 years' imprisonment) which is merely an offence against private interest. Thirdly, even for the same type of offence, a variety of penalties exist depending on the nature or degree of the harm done. This is especially the case with offences against the person.

¹⁶ Ahidjo and his self-appointed successor, Biya, ruled Cameroun for over fifty years. Both of them basked in this type of environment unchallenged, holding the population of that country in a state of permanent fear, anxiety and hopelessness and at a cost of not a small number of loss of lives.

Here, the penalty prescribed for each offence depends largely on the extent of the harm caused to the victim. The victim's age, gender, physical condition, relationship to the offender, his station in life, and the manner in which harm was inflicted do not count. The greater the harm done the more severe the penalty. Furthermore, offences against the person are generally punished more severely than offences against property, with the notable exception of aggravated theft which is punishable by twenty years' imprisonment. So severe a punishment for the infringement of the right to property (a manifestation of capitalist ideology) illegitimately elevates that right to the same level as the violation of the right to the personal integrity of the individual.

Courts can sometimes be vengeful, especially in a climate of law and order politics where the government wants to gain political mileage by appearing to be tough in fighting crime. They then inflict sentence that they believe reflects the degree of revulsion felt by the generality of the community for the particular criminal act in question, thereby apparently gratifying the public's presumed desire for vengeance against a wrongdoer. For example, when in 1972 the incidence of robbery increased dramatically, public outcry led to the legislative prescription of mandatory death penalty for aggravated theft. Those found guilty of aggravated theft were easily sentenced to death. Many robbers were publicly executed to serve, it was believed, as a general deterrent and to convince the public that the government was giving no quarter to robbers.¹⁷

¹⁷ A few examples suffice to illustrate the point. In the unreported case of *Ngum Njab* (1981), *Cameroon Tribune* 12 August 1981, the accused, a 21-year-old boy, climbed into a house and stole 8,000 francs (\$16) and some property valued at 113,400 francs (\$227). He was found guilty of aggravated theft and sentenced by the Bamenda Court of Appeal to death by firing squad. In *Ngoro Severin-Marcel* (1983), unreported, *Cameroon Tribune*, 31 March 1983, p. 6, a cuckolded husband killed his wife in the home of her paramour by chopping off her head with a machete. His conviction for capital murder and sentence to death by firing squad was confirmed by the Bertoua Court of Appeal. In the unreported case of *Mvogo Eloundou Sebastien* (1984), *Cameroon Tribune* 14 June 1984, p.6, the defendant killed his uncle by poisoning his food. He was found guilty of capital murder and sentenced to death, execution ordered to be carried out in public by firing squad. Similarly, in *Mbega Ondoa Martin* (1984), unreported, *Cameroon Tribune* 14 June 1984, p.6, the defendant who stole a goat and tried to escape with it in a motor vehicle was convicted of aggravated theft and sentenced to death by firing squad in public. In *The People v Christopher Fru* (1973), Charge No. HCSW/54c/1973, unreported, the accused destroyed the padlock used to secure the door of a house, entered the house and stole certain items. He was convicted of theft "by breaking in", a form of aggravated theft, and sentenced to death. In *Elias Wekno v The People* (1974), BCA/27c/74, unreported, the appellant stole the complainant's key from her kitchen, used it to enter the main house where he stole certain items. He was convicted of theft "by the use of a false key", another form of aggravated theft, and sentenced to death. Delivering the unanimous judgment of the Bamenda Court of Appeal in that case Inglis J said, "A false key for the purpose of section 320(1)(c) is not necessarily a skeleton key, a picked or crudely and locally made key. A key becomes false even if it is the actual key or duplicate key of a door, when the person who uses it to effect entry has no right to the key or the owner's authority to use it." The appellant in *Martin Ngafor*

Again, when sexual offences (prostitution and kindred offences, corruption of persons under 21, and indecency to minors)¹⁸ and offences against property (fraud, misappropriation of public funds) became rampant, the legislator reacted by prescribing severe penalties (in some cases sentence as high as 20 years or life imprisonment) in respect of those offences. The courts did not hesitate to pass those heavy sentences. The concept of ‘exemplary sentence’ is one courts are not slow to press into service. Courts believe in the value of punishment both as a deterrent to the person sentenced and to others. So they take the view that exemplary punishments are justified in that they serve revenge and deterrent purposes. But it is unclear how this judicial vengeful disposition squares, if at all, with the requirement of proportionality in sentencing.

Proportionate to moral guilt. To assert that the greater the harm done, the greater the punishment, does not mean that in every case the law takes into account only the harm done, ignoring the offender’s moral guilt. There are cases in which the Penal Code obliquely ordains punishment to be

v The People (1974), BCA/17c/74, unreported, was lucky. He was caught apparently stealing cement building blocks and loading them onto his truck to drive off with them. The Bamenda High Court convicted him of theft “with a motor vehicle”, also another form of aggravated theft, and sentenced him to death. The conviction and sentence were quashed on appeal for lack of evidence. But in *Sakwe Isaac v The People* (1984), CASP/19c/84, unreported, the appellant failed to have his conviction and sentence by the lower court quashed. The Buea Court of Appeal confirmed his conviction for aggravated theft. Facts were that he broke into a cooperative store by making a hole through its wall and then stole bags of cocoa from it by pulling the bags through the hole. The Court confirmed the sentence of death by hanging passed by the High Court. See also, *Julius Mua & Anor v The People* (1974), BCA/7c/74, unreported; *The People v Emmanuel Enow Besong* (1973), Charge No HCSW/21c/73, unreported; *The People v Christopher Foncham* (1973), Suit No. HCSW/52c/73, unreported; *Cho Bimweh & Mbella Paul v The People* (1986) (appellants armed with pistols, machetes and explosives stole 2.5 million francs from a liquor depot), Cause No. CASWP/54/85, unreported; *The People v Mandoline Etungwe Mathias* (1984), Charge No. HCK/77c/84, unreported; *The People v Wehbeni Aloysius* (1984) (kitchen broken into and property stolen), Suit No. HCB/4c/84, unreported; *The People v Diabe Moses & Ikome Mokoko Obadiab* (1985) (store broken into and 700,000 francs stolen), Kumba High Court, unreported. On the subject of aggravated theft, see Anyangwe C, *Criminal Law in Cameroon – Specific Offences*, 2011, pp. 422 et seq.

¹⁸ Take for example the case of *The People v Yombo David* (1982), unreported, Cameroon Tribune, 6 October 1982, p. 4. In that case, a traditional healer and self-confessed homosexual, hypnotized one of his patients, a boy, and sodomized him throughout the night. The Nkambe Magistrate’s Court sentenced him to 10 years’ imprisonment with hard labour and a fine of 400,000 francs. The Court justified the sentence on the ground that it was “by way of aggravation by virtue of his occupation of traditional doctor and also for the reason that he anaesthetized the victim of the sexual assault.” The Court went on to disqualify the defendant from ever practicing traditional or any other form of medicine and from ever having custody of any children whatsoever. The Court also ordered publication of the judgment in all news media of the country and denied the defendant the benefit of any remission of sentence.

proportionate not to the harm done but to the offender's moral guilt. This is clearly illustrated by the attitude of the Penal Code towards inchoate crimes and accessoryship. An attempt¹⁹ or a conspiracy²⁰ to commit a felony or misdemeanour is treated as the commission of the substantive offence and punishable in like manner. Similarly, secondary parties to crime (accomplices or accessories²¹) are punished in the same way as a sole or principal offender. Thus it is theoretically possible to punish with death anyone who *attempts* to commit capital murder, or a person who *conspires* with another to commit capital murder, or a person who is an *accomplice* to capital murder. Similarly it is theoretically possible to punish with death anyone who attempts treason, anyone who conspires with another to commit treason, or anyone who is an accessory to treason. Courts are not legally required to punish an attempt or a conspiracy to commit a crime less severely (except upon a finding of mitigating circumstances) than if the attempt or conspiracy were successful.

Evidently, the logic of the Code is based on the premise that the moral guilt of a person who attempts, or conspires with another, and fails is just as great as that of a person who attempts and succeeds. The co-conspirator or the attempter is no less dangerous and may have been merely unlucky in not succeeding. There is some evidence however that despite this legislative logic, judicial attitude tends to regard failure as something of a mitigating factor. Inchoate offences are not punished as severely as the completed offence. An accomplice is not visited with the same quantum of penalty as that for the sole or principal offender. Attempts are not punished as severely as the completed offence. Courts seem to take the view that notwithstanding the equivalent moral guilt of the attempter or the accomplice, the harm done by such a person is not the same as that done by the sole or principal offender and so is not deserving of the same punishment. In such a case it seems the punishment is being proportioned not to moral guilt but to the harm done or merely intended to be done.

Departure from proportionality. The court is mandated, when it comes to sentencing, to take into consideration the gravity of an offence and the need to protect the public. Additionally, allowance is made for circumstances peculiar to the offender. The circumstances under which an offence is committed may lead to a deviation from the normal penalty stipulated for the offence under the usual circumstances. This depends on aggravating and mitigating circumstances. The stipulated penalty will be increased where there

¹⁹ Section 94

²⁰ Section 95

²¹ Section 98

are aggravating circumstances; it will be decreased upon a finding of mitigating circumstances. Sentences are graded to fit the many degrees of gravity presented by the various cases which fall within the same legal category. What this means is that the maximum sentence authorised by law is reserved for the rare offences which are exceptionally heinous. Further, sentences approaching the legal maximum are reserved for offences falling within the next degree of gravity, such as form the great majority of cases coming before the courts.

The heaviest sentence which the court feels justified in imposing is usually far below the maximum sentence authorised by law for the category of offence in question. Thus, whereas the psychopathic murderer will have an increased penalty, the mercy killer is likely to get a reduced sentence; whereas the serial rapist will have an increased penalty, the husband who rapes his wife is likely to get a reduced sentence; whereas the thief who steals a lot of money will have an increased penalty, the thief who steals a loaf of bread is likely to get a reduced sentence. It is thus the case that, within the statutory limits, there are ranges of sentence appropriate to different examples of the same offence.

Often, though, the courts depart from the principle of proportionality. They adopt a retributive attitude towards punishment by inflicting a sentence that reflects the degree of revulsion felt by law-abiding members of society for the particular offence committed. For example, courts consider as particularly disgusting the fact that a killing was committed after premeditation, the fact that an offence occasioned alarm and misery, the fact that an offence was particularly wicked, and the fact that an offence is of a type that is prevalent. The public is apt to regard as very revolting the fact that a murder was planned and carried out in a cold-blooded manner, the fact that an offender is a confirmed criminal, the fact that the crime victim is an infant or a vulnerable person such as an elderly or handicapped person, the fact that the crime victim was cruelly or sadistically treated by the offender. Judges in this country sometimes pass what they call 'exemplary sentence' on the questionable assumption that such sentences serve as a deterrent both to the person sentenced and to prospective like offenders. They pass 'exemplary sentences' by steering close to the maximum penalty prescribed by law.

Another situation in which the courts depart from the principle of proportionality is where they apply the "deterrence by deprivation of fruits" theory. This they do particularly in offences relating to the economy, where the offender has committed the offence after deliberately discounting the risk he runs. If he considers that the profit derivable from the offence outweighs the disadvantages of the punishment which he foresaw and which is then inflicted, he will find the game worth the candle and he will be ready to reoffend after serving his sentence. Courts are not likely to be blind to this

psychological consideration. So, in order to deny the offender the opportunity to gain early release and to enjoy his ill-gotten gains, courts pass long prison sentences by steering closer to the maximum allowed under the law. Sentences in these cases invariably include a court order under section 35 of the Penal Code for the confiscation of any property, movable or immovable, belonging to the offender and already impounded which was used as an instrument of commission of the offence or which is the proceed of the offence; that is, confiscation of the *corpus delicti*.

§3. Sentence must be individualised

The law ordains that the sentence which the judge is minded to pass must be one which fits the criminal. This means the judge must bear in mind the particular situation of the offender, his financial position, his family status, his age, his personal character, his criminal record (if any), the particular wickedness evinced by the offence he has committed, the possibility of his reformation, and the practical means of carrying out the sentence he passes. In short, sentence must be cut to the size of the offender; it must be individualised. This requirement however puts the offender at the mercy of what opinion the judge forms of him, what has been proved of him or the way the offence was committed. It is precisely at the level of individualisation of sentence that the judge has much discretionary powers in the ambit of sentencing.

A number of un-avowed factors might be assumed to enter or influence a judge's thought process when taking a decision in a particular case. For example, demographic features of judicial officers such as age, social class, occupation, gender, religion, political allegiance, ethnicity, and background may consciously or unconsciously have an influence on judicial decision-making. It is the case that one tends to project into one's daily decisions certain aspects of one's personality which are traceable to one or more of these demographic features. It is believed that older judicial officers tend to be more offence-oriented than offender-oriented in their approach to sentencing. Judicial officers are apt to argue that they have become accustomed to preventing their own personal preferences from influencing their decisions. But, there is no evidence of how successful they are in this, and in any event it is the case that many sources of bias tend to be unconscious.

The law provides the judge with an array of weapons to enable him to individualise the sentence he may be minded to pass. It gives him a wide range of penalties and measures to enable him to individualise punishment in his choice. It provides him with a list of factors that diminish, exclude, or aggravate responsibility. It states when the enforcement of a sentence passed

may be suspended, the suspension being combined, in a fit case, with probation. The circumstances of the offender and the offence may afford good reasons for suspending the enforcement of the sentence passed or for passing a heavier or lighter sentence. Accordingly, a first offender who has committed an offence carrying a penalty of not more than five years' imprisonment may be given a suspended sentence.

Sentencing: Circumstances Affecting the Term of Sentence

A number of circumstances affect the term of sentence that the sentencer is likely to impose and the time likely to be spent in prison in a particular case. Multiple convictions, time spent in custody awaiting trial, aggravating or mitigating factors, and suspension or remission of sentence are all circumstances that affect the length of time a convicted offender is likely to spend behind bars.

Section 1. Multiple convictions: concurrent and consecutive sentences

The problem of multiple offences in sentencing arises in the context of ‘persistent’ and ‘multiple’ offenders.¹ A ‘persistent offender’ (or recidivists as he is also known) is a person who offends repeatedly, despite the fact that he has experienced criminal convictions and sentences. A person is a ‘persistent first offender’ if he is convicted for the first time of several offences. The fact that the person is convicted of several offences, though for the first time, nevertheless is an indication that he is accustomed to lawbreaking, if not to the criminal process.

A ‘multiple offender’ is a person who has been committing offences over a period of days, weeks, months or even years before he is detected, arrested, prosecuted on several charges, and convicted, so that the court has to sentence him on one occasion for several offences.² Some multiple offenders will be ‘persistent first offenders’; others will be recidivists too, having experienced a number of criminal convictions and sentences in the past. Some also will be persons sentenced for a number of offences arising from a single incident or transaction. But most will be those being sentenced for offences committed at different times during the period before their court appearance. When therefore it comes to sentencing of multiple offenders, the court is always confronted with a wide variety of combinations of offences in particular cases and equally wide variations in the time-span of the offending with which it has to deal.

¹ Ashworth, pp. 182 *et seq.*

² Idem, pp. 239 *et seq.*

In dealing with cases of persistent and multiple offenders it is open to the prosecuting authority to charge all offences committed if there is sufficient evidence to do so; or to charge a specimen offence as a sample of other offences of a long course of offending; or to frame a general charge such as a charge of conspiracy or a 'general deficiency' count in cases of repeated defalcation; or to charge only some of the offences and then invite the defendant to ask the court to take other offences into consideration when sentencing him for the crimes charged. This is the practice in England³ as it is in this country.

The last option is a win-win for both the prosecution and the defendant: the court would in all probability increase the sentence in order to take account of the offences not charged; on the other hand the offences thus taken into consideration do not rank as convictions.⁴ The offences which at the defendant's request are taken into account for sentencing purposes do not count as convictions for the simple reason that they were not charged and the court did not convict on those offences. In the English case of *Canavan and Kidd*⁵, Lord Bingham CJ enunciated the following important principle of fairness:

"A defendant is not to be convicted of any offence with which he is charged unless and until his guilt is proved. Such guilt may be proved by his own admission or (on indictment) by the verdict of a jury. He may be sentenced only for an offence proved against him (by admission or verdict) or which he has admitted and asked the court to take into consideration when passing sentence. If, as we think, these are basic principles underlying the administration of the criminal law, it is not easy to see how a defendant can lawfully be punished for offences for which he has not been indicted and which he has denied or declined to admit."

The defendant may thus be tried and convicted on several charges tried jointly, or he may be tried and convicted on several charges tried separately. A simple approach in such cases of multiplicity of convictions is to impose a sentence for each offence of which there is a conviction: one conviction, one sentence; two convictions, two sentences; three convictions, three sentences, each one additional to the others (cumulative). But sometimes things might not be that straightforward. Take, for example, a crime such as assault occasioning death contrary to section 278(1) of the Penal Code. The section

³ *Idem*, pp. 240-241.

⁴ *Idem*, chap. 8.

⁵ [1998] 1 Cr App R (S) 243.

does not require that death should have been brought about by use of a weapon. Now, if the assault that unintentionally caused death took place when the assaulter bore a weapon in a manner liable to disturb public peace or to alarm any person, such are the vagaries of prosecutorial discretion that the prosecuting authority may legitimately add a charge of dangerous carriage of arms under section 238 to a charge under section 278 (1).⁶ The Court is not likely to deprecate this course. The point might be illustrated by an English case. In *Faulkner*⁷ the offender was convicted of various offences including conspiracy to steal, assault and offences contrary to the Firearms Act. He was sentenced to three years' imprisonment for the firearm and three years consecutive for the other offences. On appeal it was argued that the offences formed part of a single transaction and ought to attract concurrent sentences. The Court, dismissing the appeal, held, reasoning in deterrent terms, that if an offender carried a firearm with intent when pursuing a criminal enterprise, a consecutive sentence should be imposed in order to discourage such conduct.⁸

However, the prosecuting authority may take the view *ceteris paribus* (all things being equal) that such an additional charge would be oppressive and unnecessary. The section 278(1) offence carries a maximum penalty of 20 years' imprisonment, and the offence under section 238 carries a maximum penalty of 2 years' imprisonment. From the point of view of punishment, an additional charge under section 238 would be redundant. The court has all the facts, which include the element of carrying a weapon, and the maximum sentence for assault occasioning death accommodates any possible sentence for 'dangerous carriage of arms'.

Assuming then that only one offence, assault occasioning death under section 278(1), is charged and a conviction is secured, there would obviously be a single sentence. But if two offences are charged, one under section 278(1) and another under section 238, and the court convicts on both (even though both crimes are as a result of a single incident), then it has a choice in expressing the manner in which the two sentences are to be served for, the law requires the court to state how multiple sentences are to be executed.

⁶ Some legitimate reasons for doing so would be the following: to ensure that the carrier or user of the weapon is clearly and separately labelled as such not only in court but also in public and in his criminal record; and, to ensure that if for some reason the defendant is acquitted on the charge of assault occasioning death, he may nevertheless be convicted on the weapon charge. The prosecution runs no risk of being accused of abusing the criminal process especially if the weapon offence also relates to times and places other than those of the assault occasioning death.

⁷ (1972) 56 Cr App R 594.

⁸ See also, *Kent* [2004] 2 Cr App R (S) 367, (consecutive sentence for firearm offence when sentencing for manslaughter); and *Attorney General's Reference No. 46 of 1997* [1998] 2 Cr App R (S) 338 (carrying a weapon or a bladed instrument).

Supposing the court works out in its mind that, 15 years is the appropriate overall sentence for both offences. It may express this overall sentence in terms of two consecutive sentences: for example, 13½ years for assault occasioning death and 1½ years for bearing arms. Alternatively, it may express the total of 15 years in terms of two concurrent sentences: for example, 15 years for assault occasioning death, 1½ years concurrent for bearing a weapon.

A person convicted of only one offence is sentenced for that offence and he serves out his sentence for the full term of the sentence, unless there is remission entailing early release. The question of concurrent or consecutive sentences therefore arises only in the context of convictions for multiple offences. An offender sentenced following convictions for multiple offences serves his sentences in the manner specified by the court in its judgment. In passing sentence the judge is required to say whether sentences are to run concurrently or consecutively or to be merged (cumulative). He may order that the sentences passed on each count should all be served at the same time (concurrently) or one after the other (consecutively). The Code frowns on cumulative sentences. But such sentences might be warranted in certain cases of sentences to fines following a conviction for simple offences. It is also possible to have sentences served successively (consecutively). The subject is however not entirely at the judge's discretion. The governing principles are stated in sections 51 and 52.

§1. Concurrent sentences

Where the court passes sentences for two or more offences, the sentences might be made concurrent or consecutive. 'Concurrent' and 'consecutive' relate to a continuing series of offences. The concept of concurrence implies temporal while that of consecutiveness suggests successiveness, separateness, or one after the other in point of time. Consequently, whether sentences are expressed as concurrent or consecutive might well depend on whether the offences for which the offender was convicted were committed contemporaneously, that is, at the same time in the course of a single transaction or incident; or whether they were committed on separate occasions against different victims and at different times and places. In *King*⁹, the driver of a lorry crashed it into a parked car when under the influence of diazepam. He pleaded guilty to dangerous driving and to driving while unfit through drugs. The Court of Appeal held that, as the dangerous driving arose out of the taking of drugs, it was not correct to impose consecutive sentences. The sentences were made concurrent.

⁹ [2000] 1 Cr App R (s) 105.

Logically, offences committed concurrently should receive concurrent sentences; and offences committed on separate occasions against different victims should result in consecutive sentences. Concurrence in time suggests contemporaneity or proximity in time and in type of offence. But the concept of contemporaneity is not free from difficulties as can be seen in the doctrine of *res gestae*, one of the exceptions to the rule against the admission of hearsay.¹⁰ In terms of the *res gestae* rule, or what in America is known as the ‘excited utterance rule’, an otherwise inadmissible hearsay statement will be admissible as evidence of the truth of its content as part of the *res gestae* (state of affairs) provided that the statement is spontaneous and it is an integral part of the event. In the law of evidence the term ‘spontaneous’ means automatically or without an interval of time sufficient to enable the maker of the statement to devise a story. Spontaneity may only exist if the statement was contemporaneous with the event. Contemporaneousness does not necessarily mean concomitant or concurrence (simultaneous occurrence). Thus, in *R v Carnall* the court admitted as part of the *res gestae* a statement made *an hour* after a serious assault.¹¹

If one offence follows immediately upon another, or even rapidly upon another, such as the case of a murderer who kills several people in an orgy of shooting, it might be legitimate to refer to the offences as occurring at the same time and then treat them as part of the same transaction or incident. But then, the longer an incident continues the more serious it usually is. Take, for example, the repeated rape of one victim or the residential rape of several victims, a holdup at a bank, a hijack, a shooting spree over an appreciable length of time. It seems right therefore that such continuing offences should be regarded as a more serious manifestation of criminality justifying a consecutive or cumulative sentence than the case of a single instantaneous offence.

Even where there is exact temporal occurrence, concurrent sentences might be inappropriate (and consecutive sentences appropriate) where the offences are of different types in the sense that they involve a violation of two or more distinct legally protected interests. Take the crime of aggravated theft. It is a more serious offence than theft not involving the use of violence. That

¹⁰ *Thompson v Trevanion* (1693) Skin. 402; *R v Bliss* (1837) 7 A & E 500; *R v Bedingfield* (1879) 14 Cox CC 341; *Teper v R* [1952] AC 480; *Ratten v R* [1972] AC 378; *R v Andrews* [1987] AC 251; *R v Nye and Loan* (1977) 66 Cr App R 252; *Tobi v Nicholas* (1988) 86 Cr App R 323; *R v Carnall* (1995) Crim LR 944.

¹¹ On the doctrine of *res gestae*, see Cross Sir R & Tapper C, *Cross on Evidence*, 6th ed., London, Butterworths, 1985, chapter xix; Heydon JD, *Evidence Cases and Materials*, 2nd ed., London, Butterworths, 1984, pp. 331 et seq.; Landa J & Ramjohn M, *Unlocking Evidence*, Hodder, London, 2009, p. 207.

is why the prescribed penalty for it is fantastically higher than that for theft *simpliciter*. Supposing a man shoots and kills another and steals his property. That would be aggravated theft. The prosecuting authority cannot merely charge aggravated theft because to do so would be to ignore the murderous assault that took place. The theft and the killing would therefore have to be charged and upon conviction for both it would be logically and morally appropriate to pass consecutive rather than concurrent sentences. The offences were concurrent in point of time but they violated different kinds of legal prohibition and protected interests (offence against property, offence against the person). The offender's criminality is more serious than if he had committed only the property offence and this is warrant for the offender to be labelled not only as a property offender but also as a violent offender.

On the subject of how sentence is expressed, the Penal Code opts for 'concurrent sentences'. This is sometimes put in the negative form as the rule against consecutive sentences. But this is not wholly correct because there are situations in which the law authorises consecutive sentences to be passed. The correct position is this: the general rule is concurrent sentence, and the exception to that rule is consecutive sentence. The general rule and the exception to it are enunciated *in extenso* in section 51 of the Code in these terms:

“(1) Where any person is convicted on several charges of felony or misdemeanour tried jointly, or of simple offence tried with either, only one sentence may be passed, not exceeding the maximum prescribed for the most severely punished offence.

(2) Where any person is convicted on several such charges tried separately, any sentence later passed may be ordered to run concurrently with, or in the case of fines to be merged in, any earlier sentence; and where it is not so ordered, the aggregate of the sentences may not exceed the maximum prescribed for the most severely punished offence.

(3) In the calculation of such aggregate an earlier sentence reduced by remission shall be counted at its reduced and not at its original length.

(4) No sentence may be ordered to run concurrently with, or to be merged in, a sentence which had already become final before the act or omission in respect of which the second sentence is passed.

(5) In respect of simple offences sentences shall not be concurrent or merged unless the court shall so order.

(6) Subject to any contrary order of the court, several sentences other than to principal penalties shall be consecutive as between themselves.”

The section is entitled ‘concurrent sentence the rule’. In reality the provision deals with more than just the typical concurrent-sentence situation. The section envisages two situations that might give rise to multiple convictions: where several charges are tried jointly, and where several charges are tried separately.

(a) Multiple convictions arising from several charges tried jointly: the totality principle

Where an offender is convicted on several charges of felony or misdemeanour tried jointly, or of simple offence tried with a felony or a misdemeanour, only one sentence may be passed. That sentence must not exceed the maximum prescribed for the most severely punished of the offences for which the offender is convicted. The judge, after convicting on two or more charges does not pronounce a sentence in respect of each offence for which there is a conviction. He proceeds to pass only one sentence in respect of all of them. In deciding the level of that one overall sentence the court takes into account all the offences for which the offender stands convicted, provided that at the end of the day the quantum of that one sentence does not exceed the maximum prescribed for the most severely punished of the offences for which the offender has been convicted.¹² This is what is known in the law of sentencing as the totality principle, a principle that applies for all forms of sentence be it custodial or the fine.

What in fact is required of the court is to pronounce one total sentence that reflects the defendant’s criminal behaviour in the multiple offences he has committed and for which he has been convicted. An offender convicted of two or more offences tried jointly gets a single sentence passed on the same occasion. That single sentence must reflect the total for all the offences for which the defendant has been convicted but not exceeding the maximum prescribed for the most serious of all those offences. Supposing an offender is convicted on three counts. The most severely punished offence carries a prescribed maximum penalty of 10 years’ imprisonment. Under the totality principle, the judge in pronouncing sentence does not say: “Count I, guilty: sentenced to 3 years’ imprisonment”; “Count II, guilty: sentenced to 1 year imprisonment”; “Count III, guilty: sentenced to 6 years’ imprisonment”; “sentences to run concurrently”. That is what he would record and say in the case of multiple offences tried separately. This is not what he does when he applies the totality principle.

In the totality principle, there are two ways of working out the overall total sentence. One option is for the judge to figure out in his head the overall level

¹² As between a custodial sentence and a sentence of fine however heavy the fine might be, the custodial sentence is always treated as more severe.

of penalty he believes would be commensurate with all the offences for which the offender is convicted. The level of penalty he determines in his mind must not exceed the maximum prescribed for the most serious of the offences for which the offender is convicted. In the hypothetical case just given, the trial judge simply says: “Count I, guilty”; “Count II, guilty”; “Count III, guilty”. And then he records and pronounces one overall sentence, say 8 years’ imprisonment, which he had figured out will be commensurate with the overall criminal behaviour of the offender as exhibited by his conviction for the three offences. He passes just one sentence in respect of all three convictions. That one overall sentence does not exceed the maximum for the most severely punishable of the three offences but will perhaps edge closer to, but not above, 10 years.

Another option is for the trial judge to allocate, notionally, the penalty for each offence. He then calculates and pronounces one total sentence by reference to the prescribed maximum penalty for the most serious of the offences, which in the example given is 10 years’ imprisonment. He might notionally make the following allocation for each of the three offences on which the defendant has been found guilty: “Count I, 3 years’ imprisonment”; “Count II, 1 year imprisonment”; “Count III, 6 years’ imprisonment”. Then when he comes to actual sentencing, he records and pronounces just one sentence. That sentence might be 6 years’ imprisonment or more (since he would be taking into account the overall criminal behaviour of the offender evinced by the three convictions), provided the sentence does not exceed 10 years.

The totality principle requires a court to consider the overall sentence in relation to the totality of the criminal behaviour and in relation to sentencing levels for other crimes.¹³ In the unreported English case of *Barton* (1972) the court captured the essence of the totality principle in these words,

“When cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences.”¹⁴

Ashworth makes the compelling argument that the application of the totality principle produces what is in effect a discount for bulk offending

¹³ Ashworth, pp. 248-254.

¹⁴ Quoted by Ashworth p. 249 referring to this case cited by Thomas DA (1979), *Principles of Sentencing*, London: Heinemann, pp.56-57

because the total sentence for a multiple offender appears excessive if cumulated, and that is because he managed to commit so many offences before being caught.¹⁵

(b) Multiple convictions arising from several charges tried separately: the concurrent-sentence rule

Upon conviction of a person on several charges of felony or misdemeanour tried separately, the judge may, *in his discretion*, order any custodial sentence later passed to run concurrently with any earlier sentence. The situation envisaged here is that of multiple offences committed by the same person and tried separately: one trial ends with the conviction and sentence of the offender; another trial follows also ending with conviction and sentence of the same offender; and so on. There is a succession of trials, convictions and sentences in respect of the same offender. In this situation the court may order any custodial sentence later passed to run concurrently with any earlier custodial sentence.

Supposing the trial of an offender on 5 June ended in his conviction and sentence to 3 years' imprisonment and his trial on 23 June on another charge ends in his conviction and sentence to 8 years' imprisonment. When passing the 8 years' sentence the court *may* order it to run concurrently with the earlier sentence of 3 years. Similarly, if at a separate trial on 14 July of the same offender for yet another offence he is convicted and sentenced to 15 years imprisonment, the court *may* order the 15 years to run concurrently with the earlier sentence of 8 years which itself had been ordered to run concurrently with the much earlier sentence of 3 years. The later sentence and the earlier ones are fused so that the prisoner stays in jail only for the duration of the longest of the three sentences (it is as if the shorter sentences were never passed). A later sentence passed is deemed to have commenced from the same date as the earlier one.¹⁶

In the case of fines the later fine merges in the earlier one so that the offender pays only the higher of the two fines to which he is sentenced. In one English case¹⁷ the offender was driving his lorry between a quarry and some road works and on ten of these journeys the lorry had been overweight. A magistrates' court sentenced him for the ten offences by simply adding together the fines for each of the offences, producing a total fine of £7,600. The Court of Appeal held that the sentence was "truly astonishing", in that the

¹⁵ Ashworth, p. 249.

¹⁶ Section 28(4)(b).

¹⁷ *Chelmsford Crown Court, ex p. Birchall* (1989) 11 Cr App R (S) 510.

trial court had simply “applied a rigid formula to each offence” and had then added up the resulting fines to produce a total. The fine was reduced to £1,300, the Court reasoning further that proper account had not been taken of the offender’s means.

It should not escape notice that the matter of concurrent sentences arising from several charges tried separately is entirely at the discretion of the court. It is up to the court to decide whether the sentences in such a situation should run concurrently or consecutively. Under section 51(2) the judge has discretion to order the sentences to run consecutively, provided the aggregate of the sentences does not exceed the maximum prescribed for the most severely punished offence. In calculating such aggregate or sum total, an earlier sentence reduced by remission is counted at its reduced and not at its original length.

In the end, the result of concurrent and consecutive sentencing is the same, because in either case the sentences passed must not exceed the maximum prescribed for the most severely punished of the offences for which the offender stands convicted. Even the total of consecutive sentences may not exceed what would have been the maximum of concurrent sentences.

Where the total of several sentences passed in respect of acts not separated by a final judgment exceeds the maximum provided by law for the most serious offence, the officer responsible for superintendence of sentences or other competent officer is required to reduce the total sentence to the lawful limit. This verges on mere hope as there is no such officer in the criminal justice system of this country. The only way of correcting such a sentence is by appeal.

There is support for the cumulative or consecutive principle of sentencing in respect of simple offences and in respect of persistent offenders. In respect of sentences for simple offences, section 51(5) provides that they “shall not be concurrent or merged unless the court shall so order.” When the court sentences to several simple offences not forming part of the same transaction or incident as a felony or a misdemeanour, it would normally order the sentences, whether custodial or fines, to be cumulative. But it retains the discretion to order those sentences to be concurrent.

Under section 88(1) of the Code, the fact of being a persistent offender (recidivist) is a general aggravating factor entailing the doubling of the maximum penalty provided for the new offence committed. The persistent offender therefore incurs an enhanced penalty by reason of his previous bad criminal record. Arguably, this is a case of increasing the sentence for a subsequent crime on account of a previously punished offence. However, the apparent iniquity of the provision is softened by the requirement that the court

must assess the relevance and recentness of the previous conviction: if the previous offence did not take place within the stated time lapse it is to be discounted as an aggravating factor because a bad record will not justify the imposition of a term of imprisonment in excess of the permissible ceiling for the facts of the immediate offence.

Apart from this provision there are no particular rules in this country on persistent offenders when it comes to concurrent and consecutive sentences. But on principle, the court may adopt the approach that for purposes of individual deterrence the sentence for each new offence should be more severe than for the previous offence, especially in view of the contemporary emphasis on security and risk. Alternatively, the court may adopt the progressive-loss-of-mitigation approach according to which a first offender receives a reduction of sentence, and with second or subsequent offences an offender progressively loses his source of mitigation. Both approaches appear to be embedded in section 88(1). The fact of having a previous bad criminal record is an aggravating factor which *ipso jure* entails a loss of mitigation. Being a persistent offender is an aggravating factor warranting the imposition of a more severe penalty for the immediate offence than would have been the case had the person been a first offender (a factor considered by the courts as a source of mitigation).

“[T]he justification for the discount for first offenders rests partly on recognition of human fallibility, and partly on respect for people’s ability to respond to the censure expressed in the sentence. The justification for the gradual losing of that mitigation on second and subsequent convictions is that the ‘second chance’ has been given and not taken: the offender has forfeited the tolerance, and its associated sentence discount, because the subsequent criminal choices show insufficient response to the public censure. In principle, therefore, the second offence deserves greater censure than the first (unless there is good reason to indicate otherwise), and the third offence may be censured fully. But the seriousness of the offence must remain the primary determinant of sentence, and therefore sentences imposed on repeat offenders should not cumulate so as to lead to custodial terms greater than the current offence could justify.”¹⁸

In this country, the story of legislative measures aimed specifically at serious and persistent offenders is one of failure. The Penal Code gives the courts sufficient discretion within a wide penalty range to allow them to pass

¹⁸ Ashworth, p. 88.

fairly long sentences on persistent and serious criminals. But the positive effect of such long sentences in achieving the criminological goal of crime reduction is yet to be demonstrated. The only penal enactment making special provisions for persistent and serious offenders is the reactive piecemeal legislation introduced in 1972 and 1977 increasing the penalty for certain crimes and creating new offences with stiff penalties: theft¹⁹, sexual offences²⁰, homosexuality²¹, 'immoral earnings'²², bad cheques²³, vagrancy²⁴, 'dangerous preparations'²⁵, 'false news'²⁶, procuring or peddling influence²⁷, and corruption offences²⁸. The court is additionally required to order confiscation upon conviction for corruption.

These measures had some attractiveness to politicians and the media because they appeared 'tough'. But the attractiveness was superficial particularly because the measures relied on crude assumptions about the causes of offending and because the policy makers failed to grasp the criminogenic effects of the penal system itself. There was an initial flurry of excitement by the police, the prosecuting authority and the courts in 'strictly' enforcing the new laws. There was thus a burgeoning case-law on these offences.²⁹

But with no lasting positive results to show for the excited enforcement of the new laws, the 'shock and awe' initially created by the draconian legislative measures quickly wore out. Criminality in these areas returned with a vengeance and do not appear to have abated, as cases of endemic corruption, of high levels of misappropriation of public funds, of white collar criminality, of increased incidence of homosexuality, and of aggravated theft clearly show. The courts themselves apparently grew weary of pronouncing death sentences and began seeking ways to water down the harshness of the law on aggravated theft. One way in which they did so was to insist that the serious nature of the offence demands a strict adherence to the standard of proof required in

¹⁹ Sections 318, 320 and 324.

²⁰ Sections 343, 344, 346 and 347.

²¹ Section 347a.

²² Section 294.

²³ Section 253.

²⁴ Section 247.

²⁵ Section 248.

²⁶ Section 240.

²⁷ Section 161.

²⁸ Sections 134, 134a and 135.

²⁹ See also footnotes 812 and 813. Unfortunately, these and many other cases are not reported anywhere because of the absence of law reports. Apart from sporadic and ephemeral private initiatives of report of cases there is a complete absence of official report of decided cases in this country.

criminal cases, which is proof beyond reasonable doubts.³⁰ In *The People v Mathias Ncho* (1973)³¹, therefore, where a padlocked door was damaged so as to gain entrance into a house which was then burgled and one of the stolen items found with the defendant, the Buea High Court dismissed the aggravated theft case “for lack of evidence”. In *Elias Wekno v The People* (1974)³² the appellant’s conviction and sentence to death for aggravated theft by use of a false key to break into and to steal from a kitchen were quashed “for lack of evidence”. In *Martin Ngafor v The People* (1974)³³ the appellant’s conviction and sentence to death for aggravated theft (in the instant case stealing by use of a motor vehicle) were set aside “for lack of evidence”. In *Gregory Fru v The People* (1973)³⁴ the Court of Appeal at Buea allowed the appeal against conviction and sentence to death for aggravated theft on the grounds that the protection against retrospective legislation inscribed in the preamble to the constitution subsisted. The provision expressly provides that a man may not be judged or punished except by virtue of a law promulgated and published before the offence was committed.

The courts also began to interrogate the concepts of ‘break-in’ and ‘climb-in’, and to distinguish between actual and constructive break-in in the context of aggravated theft ‘by breaking in’ or ‘by climbing in’. In *Nji Christopher v The People* (1984)³⁵, the padlock used to secure the door of a house malfunctioned and failed to secure the door. The appellant simply pushed the door open, entered the house and stole a number of items. The Court of Appeal at Buea quashed the conviction and death sentence for aggravated theft on the grounds that there was no ‘breaking in’ and that the appellant was not guilty of aggravated theft but of simple theft. In *The People v Ngoungoun* (1984)³⁶, the Bamenda High Court held, questionably, that there is no breaking in where a trespassory entry into a house is through a door which though closed was knowingly or unknowingly left unlocked.

Regarding the distinction between actual and constructive break-in the law in this and other jurisdictions is clear that actual ‘breaking in’ entails the use of any kind or amount of force to gain unauthorised entry into a place or conveyance. This might take the form of smashing or removal, usually from outside, of a barrier or any other object that is used to close a passage or is erected to stop persons from entering premises. It might also take the form of

³⁰ *The People v Bobotie Mbiaye* (1973), HC/43c/73, unreported.

³¹ Charge No. HCSW/37c/73, unreported.

³² Charge no. BCA/27c/74, unreported.

³³ Bamenda Court of Appeal, No. BCA/17c/74, unreported.

³⁴ Crim. App. No. CASP/4c/73, unreported.

³⁵ Cause No. CASWP/24/84, unreported.

³⁶ Suit No. HCB/42c/84, unreported.

breaking a door³⁷ or a door lock, or breaking or lifting a window or creating a passage through the roof or wall of a house or tunnelling into the house.

Constructive breaking-in, by contrast, does not require the use of force to gain ingress into a house, a building, premises or a conveyance. The use of tricks, fraud, deceit or other cunning to have access is enough. Thus, a person who enters a building by concealing himself in a box is guilty of constructive breaking in.³⁸ Similarly a person constructively breaks into a house if he gains ingress into it by fraudulently misrepresenting himself as a worker of a utility service sent to check a utility fault in the house.³⁹ It is also constructive breaking-in if a person enters a house to steal with the conspiratorial agreement or acquiescence of the servant of the house.⁴⁰ Also, if a person enters premises by means of a false key copied from the keys of the premises which were lent to him by the servant of the proprietor of the premises, he will be guilty of breaking in.⁴¹

A number of High Court and even Appeal Court decisions appear to suggest that stealing by constructive break-in is not enough to incur criminal liability for aggravated theft under section 320(1)(c) of the Penal Code. In *The People v Peter Nche* (1973)⁴² the Bamenda High Court said that where a person gains admission into a house by means of tricks or threats, that would be constructive break-in; but that it does not amount to breaking in under the law of aggravated theft. There, the Court considered actual breaking in to be where a person, in order to let in any part of his body or a weapon or other instrument, for the purpose of effecting his felonious intention, digs a hole in the wall of a house, breaks a door or window, picks the lock of a door or opens it with a false key, or lifts the latch of a window or door, or unloosens any fastenings to doors or windows which the owners have provided. According to the court, entry into a house or building through a partly opened window would not be breaking in. The same court also held in *The People v Webbeni Aloysius* (1984)⁴³, that there is no breaking in where a person enters a house that has been inadvertently left unlocked by its occupant. Similarly, the Court of Appeal at Buea held in *Nji Christopher v The People* that as the padlock used to secure the door of the house failed to fasten the door and as the

³⁷ A door is a hinged, sliding, lifting or revolving barrier for closing entrance to building or room or cupboard or conveyance.

³⁸ *Nicholas v State* (1987) 68 Wis 416, 32 NW 543.

³⁹ In *R v Boyle* [1954] 2 All ER 72 the accused was convicted of burglary for constructively entering into a house and stealing a handbag by misrepresenting himself as a worker of the BBC sent to check disturbances caused on the wireless.

⁴⁰ *R v Cornwall* (1830) 2 Stra 881.

⁴¹ *R v Chandler* [1973] 1 KB 125.

⁴² Charge No. BAHC/37c/73, unreported.

⁴³ Suit No. HCB/4c/84, unreported.

appellant merely pushed the door open to enter and steal from the house, there was no break-in and he cannot be properly convicted of aggravated theft but only of simple theft.

These decisions are clearly not on firm legal grounds. They appear merely to be an appeal to literal interpretation resorted to in order to save the accused persons from aggravated theft conviction and the consequential mandatory death sentence. The same literal interpretation was adopted in *The People v Tashong Moses* (1984)⁴⁴, to save the accused from conviction for aggravated theft by climbing in and from imposition of the death penalty. The court was of the opinion that the law on aggravated theft by climbing in should be limited to cases where the accused actually climbs in⁴⁵. In the view of the court, there is no climbing in where the window of a house is say half a metre from the ground and that all the accused did was simply to step into the house through that window without having to climb.⁴⁶

The reasons for the ineffectiveness of the new crimes and stiff penalties as a deterrent are not hard to divine. There is a complete absence of constructive measures such as proper social provision for people in need, the disadvantaged segments of society. Aggravated theft offences disproportionately target the poor, for almost all of those involved in robbery and burglary are not professional criminals operating in a web of organised crime such as big time armed robbery of banks, highway robberies and the like but small-time thieves often acting solo and opportunistically. Furthermore, the public in this country tends to view white-collar criminality as less blameworthy than other forms of criminality. In fact, there is now so much moral degeneration in the country that the larger the amount of money the government minister, the corporate executive or the civil servant steals the more likely it is that he will get social commendation rather than condemnation. Even the ruler is not held accountable for anything he does or for his questionable use of taxpayer's money.

§2. Consecutive sentences and their enforcement

The Court, unless it decides otherwise, may order sentences to accessory penalties or sentences to preventive measures, to be consecutive.⁴⁷ The general

⁴⁴ Suit No. HCB/18/84, unreported.

⁴⁵ Such as by scaling or clambering or using a ladder or a rope.

⁴⁶ *Tashong* may be contrasted with *Godguide Ngayu & William Talla* where the court emphatically rejected defence argument that the defendant could not have actually climbed in since the window through which he entered the shop from where he stole was just a yard off the ground.

⁴⁷ Section 51(6)). Accessory penalties are forfeiture, publication of the judgment, closure of establishment, confiscation; and preventive measures are ban on occupation, preventive

rule of concurrent sentences therefore applies only to principal penalties: death sentence, custodial sentence, fine. The court may also order sentences for simple offences to be consecutive, provided that where the simple offence forms part of the same transaction as a felony or misdemeanour and therefore tried jointly with either, the rule of concurrent sentences will apply instead.

Equally, the court may order a second sentence passed in respect of a separate prosecution for a crime committed after the sentence for an earlier crime had become final to be consecutive to the earlier sentence. The law provides that if the second offence is committed after the conviction for the first has become final the sentences must run consecutively. The rule of concurrent sentences would however apply in the case of a second offence committed in the course of the first prosecution or an offence committed earlier but not discovered until after the first prosecution has been commenced.

The Penal Code lays down in section 52 the order in which consecutive sentences are to be served. In the case of consecutive custodial sentences, the subsequent sentence does not begin to be served until expiry of the earlier one. Where a preventive measure is combined with a principal penalty, the former (measure) is served only after the latter (penalty) has been served or suspended. In other words, that aspect of the sentence relating to principal penalty is first served before the aspect relating to preventive measure. This means the two are served consecutively. By contrast, where a convicted offender is given a sentence relating to both a principal and an accessory penalty, both aspects of the sentence are served at the same time, that is, concurrently.

It is unlikely that a convicted offender would be sentenced to several preventive measures in one judgment. More likely is the case where he is sentenced to several preventive measures, each in a separate judgment. In that case, the measures would be ordered to run consecutively. For example, a convicted offender may be sentenced by one judgment to preventive confinement and by a later judgment to confinement in a health institution as a drug addict. In such a case, the sentence of preventive confinement is stayed and the sentence of confinement in a health institution commenced immediately. Evidently the reason for this order in serving the sentences is health grounds: treatability takes precedence over incapacitation. At the expiration of the period of confinement in a health institution for detoxification, the earlier sentence to preventive confinement then commences. When a penalty is imposed in the course of service of a measure,

confinement, post-penal supervision and assistance, confinement in a special health institution, confiscation.

the service of the penalty kicks in at once and service of the measure is stayed until the penalty has been served out. Here, incapacitation takes priority over preventative considerations. At the expiry of the principal penalty, service of the measure is then activated.

Section 2. Commencement and calculation of custodial sentence

The trial judge becomes *functus officio* after he has passed sentence, and, in the case of multiple sentences, after he has expressed the manner in which the sentences are to be served. When exactly the prisoner's sentence begins and ends is no longer a matter for the courts but for the prisons administration (correctional services).

§1. Commencement of sentence

In the normal run of cases, a defendant who has not been in custody pending trial and whose trial ends in conviction and sentence would be whisked away to prison and he starts serving his sentence as from that day. The matter may not be straightforward in a situation where the prisoner: goes on appeal; or is a pregnant woman or a woman recently delivered of her baby; or is a pregnant woman already in custody pending trial; or is hospitalised while in custody pending trial; or where husband and wife are offenders and at the time of their sentence were not in custody pending trial.

Prisoner appeals the decision: As a general rule, a custodial sentence does not immediately deprive the convicted offender of his liberty. The law provides that where an offender has not been in custody pending trial, and where no warrant of arrest or remand is issued against him at the time of judgment, a custodial sentence may not be enforced until it has become *final*.⁴⁸ A sentence is final, even though it may still be subject to appeal. When a convicted offender is sentenced he is taken straight away from the courtroom to prison. It makes no difference that he has given the court notice of his intention to go on appeal. If he does go on appeal, he may however obtain bail from the appellate court pending the determination of his appeal. In practice, bail in such circumstances is rarely granted and is therefore seldom applied for.

Prisoner is a woman not in custody pending trial but is pregnant or is recently delivered of her baby: A convicted female offender who is not in custody and who is pregnant or who has recently given birth does not begin to serve a custodial

⁴⁸ Section 27(1).

sentence until six weeks after delivery.⁴⁹ The basis for drawing the line at six weeks would seem indefensible. A six-week baby would still be a suckling. Undesirably, the mother would then have to take her baby along with her to prison.

Prisoner is a pregnant woman and is in custody pending trial: A pregnant woman who is in custody pending trial or a woman who gives birth while in custody continues to remain in custody for six weeks.⁵⁰ Since the period spent in custody awaiting trial must be reckoned as part of the term of the sentence, the ultimate release of the woman is not postponed by reason of her starting to serve her sentence later. The choice of the period of six weeks and not a period less or more than that remains a mystery.

Prisoner is hospitalised while serving a jail term or while on remand into custody pending trial: On principle, the law is the same where a person takes ill while in custody and is moved to hospital. The law is equally the same where a person already serving a prison sentence becomes ill and is moved to hospital. In either of these cases, the prisoner continues to remain in hospital until cured. The time spent in hospital is taken into account in computing the term of the sentence.

Husband and wife not in custody at the time of their sentence: It may well happen that both husband and wife are sentenced to imprisonment for the same or different offences. In that event, the term of sentence to which one spouse is subject is suspended until expiry of the other spouse's term of sentence; provided that the following conditions are satisfied: the term of sentence of imprisonment is for less than a year; both spouses were not in custody at the

⁴⁹ Section 27(2).

⁵⁰ Section 27(3). The provision appears to be based on the assumption that the place where remandees are held as well as the regime and conditions of their detention are better than those of persons convicted and sentenced. Theoretically that is what should obtain but in practice that is hardly the case. Both sets of persons are held in the same prison facility and virtually under the same conditions. In terms of article 24 (b) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, States Parties undertake to "ensure the right of ... women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity." Under article 30 of the Charter on the Rights and Welfare of the Child in Africa, State Parties "undertake to provide special treatment to ... mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular ensure that a non-custodial sentence will always be first considered when sentencing such mothers ... and ensure that a mother shall not be imprisoned with her child."

time the sentence was passed; and the spouses have a fixed common residence and a child under the age of 18 years supported by them and in their charge.⁵¹

§2. Calculation of custodial sentence

In calculating a custodial sentence expressed in days, months or years, a day means 24 hours, a month means 30 days, and a year is reckoned by calendar date.⁵² Where a new sentence is ordered to run with one already passed (i.e. a new sentence is passed concurrently with one already passed), service of the new sentence is deemed to have begun to run from the time when the first sentence began to run.⁵³ If a prisoner escapes from jail, the period during which he was at large (unlawfully at liberty) is disregarded in computing the term of the sentence to which he is subject.⁵⁴ Supposing a convicted offender is sentenced to 10 years' imprisonment in January 2015. Supposing further that he escapes from jail in December 2016 and that he is retaken in February 2020. He would have served only two of the ten years to which he was sentenced and would have been on the run for three years. The three years during which he was on the run will not count as part of the period of his imprisonment. Had he not escaped he would have served his term until 2025, assuming he does not get an early release. Now, however, since he has been unlawfully at liberty for three years he will be up for discharge from prison only in 2028.

However, any term of sentence passed for the offence of escaping from jail is consecutive on that which the prisoner was trying to avoid by escaping. This means he will first serve out the earlier term of sentence to which he was subject. Thereafter, the sentence for the offence of escaping from lawful custody will kick in. In our hypothetical case, suppose that the retaken prisoner gets 5 years for escaping from prison. He will begin to serve that term of sentence only on the expiration of the earlier term of sentence in 2028.

The time during which an accused person is in custody pending trial is wholly reckoned as part of the term of sentence passed⁵⁵. What happens is that the trial court passes sentence without reference to any period spent in custody, and then automatically deducts such period from the sentence passed. If the sentence is a fine only, the court may relieve the convicted offender wholly or in part of that fine.⁵⁶ In computing the term of any custodial

⁵¹ Section 27(4).

⁵² Section 28(1)(2)(3).

⁵³ Section 28(4)(b).

⁵⁴ Section 28(5).

⁵⁵ Section 53(1).

⁵⁶ Section 53(2).

sentence, the day on which the offender was taken into custody under that sentence is always included in the term.

Where the period spent in custody awaiting trial exceeds the duration of the sentence passed, the offender is released at once. But, unfortunately, neither in this case nor in that of an acquittal does the question of compensation for the period held unlawfully in detention arise. Thus, if a person is held in custody for months, as it frequently happens, and is eventually acquitted by the court, he cannot sue the state for compensation for such detention. A limited form of redress however exists under section 53(2) in respect of an offender who, after having been in custody awaiting trial, is sentenced to a fine only. In such a case, the trial court may relieve him wholly or in part of the said fine. This is however a discretionary order which the courts, in practice, make only when of the opinion that the time spent in custody is already sufficient punishment.

Section 3. Mitigation and aggravation of punishment

The court may increase the sentence because of aggravating factors, and it may reduce it as a result of mitigating factors. Certain circumstances either relating to the offence or to the offender may operate as aggravating or mitigating factors.

§1. Aggravation of punishment

The Code makes provision for two general aggravating factors, namely, previous conviction, and the fact of being a public servant. Under section 88, a previous conviction counts as an aggravating factor. The section provides:

“(1)(a) Wherever a new offence defined as a felony or misdemeanour is committed within a period of time running from the date of the final conviction and expiring within five years of release from or prescription against a sentence for felony or misdemeanour, the maximum penalty provided, if of limited duration shall be doubled.

(b) Wherever a new simple sentence is committed within a period of time running from the date of final conviction and expiring within twelve months of release from or prescription against a sentence for a simple offence – the maximum penalty provided, if of limited duration, shall be doubled.

(2) This section shall also apply as between successive sentences of detention.”

The previous conviction must have become final before commission of the subsequent offence. There is no aggravation in the case of conviction for felony after a previous conviction for misdemeanour. There is equally no aggravation if the previous conviction was for felony but the sentence was for five years or less. In a case of simple offence the interval between the previous conviction and the subsequent offence must not exceed one year, and the two offences must have been committed within the territorial jurisdiction of the court having *ratione materiae* (subject-matter) jurisdiction. In a case of misdemeanour the maximum interval is five years and there is no territorial limitation. Consistent with the provisions of sections 14 and 15 of the Penal Code, even offences committed abroad also count as previous convictions. In the case of felony there is no limit whether of time or of space: the offence will count as a previous conviction regardless of where it was committed and regardless of the interval between the previous conviction and the subsequent one. Since section 88 is concerned with previous *convictions* it would seem that an offence committed while on bail on another charge would not be treated as an aggravating factor.

Under section 89 the fact of being a public servant is also an aggravating factor. This factor applies to any public servant who commits an offence against which it is his duty to guard or to take action (e.g. the police officer who steals property or who commits an assault; the customs and excise officer who smuggles goods; the prison warder who abets a punishable escape from prison). The section enacts:

“(1) Subject to any special penalties provided for felonies or misdemeanours committed by public servants, the fact of being a public servant established or otherwise shall aggravate the responsibility of any such person guilty of any other felony or misdemeanour against which it is his duty to guard or to take action.

(2) The penalty in such a case shall be increased as under the last preceding section.”

Any increase of sentence incurred by reason of previous conviction or by the fact of being a public servant is in addition to any increase resulting from particular or special aggravating factors (e.g. the fact of being a habitual abortionist or of being a health practitioner are special aggravating circumstances relating to the crime of abortion) and to any supplementary sentence (e.g. closure of an establishment).

Whenever sentence is aggravated under section 88 or section 89 the maximum penalty provided for the offence is doubled, except, of course, that sentences of death or for life undergo no further increase. A number of fascinating sentencing issues and arguments such as 'law and order', 'equal treatment' and so on are raised in the context of very serious cases of the most serious offences through concepts such as 'aggravating circumstances'. But they need not detain us.

It is noteworthy that apart from these two general statutory aggravating circumstances, the facts of a given case may elicit factors apt to be considered by the judge as aggravating factors, for example, the particularly heinous manner in which the offence was committed, the infancy of the victim, the egregious betrayal of trust that the commission of the offence evinced, and so on.

§2. Mitigation of punishment

In passing sentence the court may take mitigating factors into account. In terms of section 90,

"The benefit of mitigating circumstances may be given, for reasons to be recorded in the judgment, save where they are by law expressly excluded."

Mitigating circumstances, unlike aggravating factors, are not specified. They are in the discretion of the court. However, whenever the court grants the benefit of mitigating circumstances, it must record in its judgment the precise circumstance(s) it has taken into account as mitigating factor. It is the almost invariable practice of the courts to take the offender's good character, his large family responsibilities, his young or old age, and sometimes his poverty and wretchedness as mitigating factors. Also, the courts tend to give discount for a guilty plea on the reasoning that such a plea saves the time of the court and enables the court to dispose of cases with dispatch. In fixing sentence it is right to give the convicted offender credit for his good record or for pleading guilty or for informing against his co-prisoner. But it would be wrong to add anything to the sentence on account of his bad record or of the fact that he pleaded not guilty or that he conducted his defence in a particular way. It is proper to reduce a fine because of the prisoner's poverty; but it is improper to increase it because of his wealth.⁵⁷

⁵⁷ Smith & Hogan, *Criminal Law*, 3rd ed., Butterworths, London, 1973, p.10.

Further, courts tend to consider first offending as a discount on sentence, and they are likely to consider as a mitigating factor the fact that the offender is the sole bread winner of his family or is a mother of very young children. When he stands up to make an *allocutus*, counsel is sometimes heard pleading for mercy by inviting the court to consider the offender's crime as 'the work of the devil' or temptation by the devil even as he tempted Jesus. But this appeal to religious sentiment has never impressed any judge, some of who might instead be inclined to consider this 'work of the devil' as in fact a special aggravating factor warranting a longer period of incapacitation so as to thwart the devil's scheme of working through the offender or of further tempting him.

Mitigating factors operate to reduce the sentence that would otherwise have been passed.⁵⁸ In a case of misdemeanour, for example, a finding of mitigating circumstances allows for the imposition of what is in effect a token sentence.

"91 (1) Upon a finding of mitigating circumstances in favour of any person convicted of felony, the sentence may be reduced to not less than ten years' loss of liberty if the offence be punishable with death, to not less than five years if it be punishable with loss of liberty for life, and to not less than one year in any other case.

(2) Where the penalty is reduced under the last subsection to ten years or less the court may add a fine of up to two million francs."

Section 4. Modification of sentence: suspension and remission of sentence

Most convicted offenders do not serve their custodial sentences fully or at all. Some may be given a suspended sentence and therefore no immediate imprisonment for them, that is, they do not even begin to serve the sentence passed.⁵⁹ Others go to jail but do not serve out the full term of their sentence either as a result of death, or of remission of sentence - pardon, amnesty, release on licence, prescription.⁶⁰ A suspended sentence is at first revocable but may later become irrevocable. By contrast, remission of sentence is irrevocable from the beginning unless it is a conditional remission. In either situation there is a modification of the sentence as it was passed. The

⁵⁸ Sections 91 and 92.

⁵⁹ Sections 54-65.

⁶⁰ Sections 66-68.

modification does not however affect or expunge the conviction recorded against the offender.

§1. Suspension

An offender sentenced to a fine, or to a term of imprisonment of between 10 days and 5 years, may be given a suspended sentence with or without probation. A suspended sentence without a probation order may be described as simple suspension.

Simple suspension. The court may pass a suspended sentence, that is to say, it may order, for a specified period of time, the suspension of the enforcement of the sentence it has passed. It is not only a custodial sentence that may be suspended (i.e., a suspended imprisonment). A fine may also be suspended (i.e., a suspended fine), provided that the fine is not in consequence of a mitigating factor taken into account when sentencing for an offence punishable with a custodial sentence solely. The matter of suspended sentence not accompanied by probation order is consolidated in section 54 of the Penal Code:

(1) Subject to any contrary provision of law, upon conviction for felony or misdemeanour of an offender not previously sentenced to imprisonment, or where after such sentence his conviction has been expunged, the court may, for reasons to be recorded in the judgment, suspend for a period of from three to five years the enforcement of any sentence of imprisonment for five years or less, or of fine not imposed under section 92 (2) of this Code.

(2) Such suspension shall not affect any accessory penalty or preventive measure resulting from the conviction.

(3) Where within the period so fixed, calculated from the date when the judgment becomes final, the offender commits a further felony or misdemeanour for which he is sentence to imprisonment, and where such sentence is not suspended on probation, both sentences shall be served consecutively, that which has been suspended under this section being served first.

(4) The expiry of the said period shall otherwise produce the effects described by section 69 of this Code.

(5) This section shall also apply as between successive sentences of detention.”

The legal framework of the suspended sentence in the Penal Code is that a sentence is imposed but its execution is suspended. Execution of the sentence

passed is suspended on condition that the convicted offender refrains from committing any offence within the period of time specified by the court. The court suspending a sentence must state in the judgment its reasons for doing so. It must also specify the period of the suspension, which must fall within three and five years.

If the offender fails to live up to this condition and is convicted of an offence committed during that period, the following consequences will follow. The court will sentence the offender for the offence committed within the operational period of the suspended sentence. It will also revoke the suspended sentence and activate the imprisonment that was suspended. There will thus be two convictions and two sentences against the offender and the court has a duty to order the sentences to be consecutive, the earlier sentence served out before the later one. However, at the trial for the offence committed within the operational period of the suspended sentence, the court may not treat the original offence for which the suspended sentence was imposed as an associated offence, that is, as an offence linked to this second offence. The offender is not convicted of that original offence in the present proceedings, and neither does the court sentence him for it in the present proceedings – it merely activates a sentence already imposed. In *Crawford*⁶¹ the Court of Appeal in England held that when a person is sentenced for an offence committed within the operational period of a suspended sentence, the original offence for which the suspended sentence was imposed cannot be treated as an associated offence. But on principle it would count as a previous conviction and thus an aggravating factor.⁶²

The suspended sentence has no immediate bite in that there is no immediate imprisonment or payment of fine. Nevertheless, it is a sword of Damocles hanging over the head of the offender throughout the specified period of the suspension of the penalty, which is between three and five years.

⁶¹ (1993) 14 Cr App R (S) 782.

⁶² The legal framework of this form of suspended sentence is similar to that of the English conditional discharge. The major difference between the two is that in the case of the conditional discharge the court convicts but sentences for the original offence which gave rise to the conditional discharge only if the offender commits an offence during the specified period of the conditional charge. The imposition of sentence itself is suspended, subject to the offender keeping within the law. If the offender misbehaves, the court for the first time imposes a sentence of imprisonment for the original offence, taking into account the offender's original misconduct. The essence of a conditional discharge is therefore a warning: the court will convict but is prepared to pass no sentence for the present offence, on condition that there is no reoffending within the specified period. A conditional discharge is different from a binding-over which is a device whereby the convicted offender is required to enter into a recognizance, with or without sureties, to be of good behaviour for a specified period.

The suspended sentence is punitive, and so it is better to assess it at the time of conviction rather than under the influence of subsequent developments. Besides, an offender with a fixed duration of imprisonment before his eyes is perhaps more likely to be careful than one who may suffer from the comfortable illusion that the court will not be too hard on him.

The purpose of a suspended sentence is to administer a warning to the convicted offender, so that he may direct his mind to the consequences of a new breach of the law. The suspended sentence is both a threat and a promise. It is a threat in that in the event of relapse within the period of suspension fixed by the court, both the original sentence and the subsequent one will be served consecutively. On the other hand, where the convicted offender commits no offence within the operational period, his conviction will be expunged: if he stays out of trouble or has no brush with the law (i.e., there is no reoffending) throughout the operational period, the suspension of the sentence becomes irrevocable, and his conviction for that offence disappears, just as in the case of rehabilitation under section 69 of the Code.

Generally, courts give a suspended sentence to meritorious convicted offenders, notably to first offenders whose offences are circumstantial misadventures. The circumstances of the offender and the offence may afford good reasons for suspending the enforcement of the sentence passed. Where the court gives a first offender a custodial sentence of not more than five years' imprisonment, it may, in its discretion, order suspension of the sentence.⁶³ Sentence may not be suspended in the following cases: (i) where the court passes a sentence of more than five years; (ii) where what is involved is a simple offence; (iii) where the offender has a bad criminal record (i.e., previously sentenced to imprisonment), unless the previous conviction has been expunged; (iv) where the law expressly excludes suspension, as under section 184 (3) of the Penal Code which excludes suspension of sentence passed for misappropriation of public funds; and (v) where what is involved are accessory penalties or preventive measures.

The suspended sentence does not appear to be widely in use in this country. But even in its limited use, it is not known what characteristics of offenders courts tend to use it for. The impression one gets is that as between persons who are first-time offenders those more apt to get suspension of terms of imprison are 'persons of intelligence and education' and persons who are white-collar offenders. So, a long-standing criticism made in other jurisdictions and also valid in this jurisdiction is that the suspended sentence is

⁶³ Section 54(1).

a soft-measure for dealing with certain categories of offenders and a let-off, with no serious consequences for many offenders. In this jurisdiction policing leaves a great deal to be desired in many respects and the rate of crime detection is abysmal. The consistent complaint of the police is lack of necessary resources – human, material and technological. It may be speculated that the expectation of the drafters of the Penal Code was probably that the use of the suspended sentence would ensure that prisons do not become overcrowded. But the malfunction of the suspended sentence in this country has resulted in the complete failure of the hoped-for reduction in the prison population.

Probation. When it is said that the court has put an offender on probation it means it has subjected him to obligations of supervision and assistance.⁶⁴ The Code speaks of ‘offender’ in general terms. It gives no clue of what kinds of offender probation orders are meant for. But if the provisions of sections 42 and 58 are anything to go by, the unemployed, drug or alcohol addicts, gamblers, people with disabilities or other health problems, persons suffering from psychological trauma, persons with previous convictions, and vagrants and other delinquents or petty criminals would be the most likely candidates for probation.

Probation is dealt with not as a preventive measure but as a suspension of punishment, on condition of not reoffending within a time fixed between 3 and 5 years by the court. It is not additional to, but is in substitution for, the custodial sentence that was passed. It bears a great likeness to post-penal measures, particularly in the obligations constituting it. The obligations which an offender under post-penal supervision and assistance is required to comply with⁶⁵ are exactly the same ones which an offender under probation is required to comply with.⁶⁶ The obligations are general and special.⁶⁷ It is the duty of the nominated magistrate, assisted by a probation officer, salaried or performing his duties *pro bono*, to ensure that the offender complies with his probation obligations.⁶⁸ There is provision for dealing with breaches of probation. Essentially, the court must order the custodial term to take effect. Non-compliance of an obligation may result in return to court and conviction for breach of probation obligations, entailing automatic revocation of the

⁶⁴ Section 56(1).

⁶⁵ Sections 40-42.

⁶⁶ Sections 57 and 58.

⁶⁷ Section 41 and 42.

⁶⁸ Section 56(2).

suspension with probation and the activation of the prison sentence that was passed.⁶⁹

Where a sentence of 6 months or more of imprisonment may be suspended, suspension may be combined with probation.⁷⁰ This practically excludes sentences to fine alone. When combined with probation, suspension may also be granted to an offender with a previous sentence of imprisonment suspended without probation or with a previous sentence of imprisonment for less than 6 months not suspended.⁷¹ The period of probation, like that for suspended sentence, must be between three and five years.⁷² The ‘supervision period’ (in the case of probation) would probably be of the same duration as the ‘operational period’ (in the case of suspended sentence) which it accompanies.

When the court imposes a suspended sentence combined with probation it is required to order the offender to comply, during the period of probation (‘supervision period’), with the six general obligations listed under section 41 of the Penal Code.⁷³ The court may additionally subject the offender to one or more of the twelve special obligations listed in section 42 of the Penal Code.⁷⁴ Each of these obligations can also form part of post-penal supervision. The offender is liable to be ordered to serve the term of imprisonment if either there is breach of any general or special probation obligation during the supervision period, or the offender commits an offence during the operational period. Provision is made under section 56(4) for what is in effect periodic review of probation. Under that provision the court may assess the offender’s progress and may at any time suspend all or any of the special obligations, or vary them in order to alleviate them rather than to make them more burdensome.

Section 59 sets out the duties of a probation officer. These are nearer to those of an educator. They consist of four distinct kinds of duty: a monitoring duty, a motivational duty, a support duty, and a reporting duty. The monitoring duty requires the probation officer to personally ensure that the offender “observes the general and special obligations of his probation”⁷⁵. The motivational duty requires him “to stimulate and encourage the offender’s efforts in the direction of reform, in particular his family and occupational re-

⁶⁹ Section 60.

⁷⁰ Section 55(1).

⁷¹ Section 55(2).

⁷² Section 55(3).

⁷³ Section 57.

⁷⁴ Section 58.

⁷⁵ Section 59(1).

adaptation”⁷⁶. The probation officer has a support duty, the duty “to afford the offender all moral support ... and ..., where the offender is in need of financial support, to apply to the magistrate in charge to approach any social assistance organisation with a view to a grant.”⁷⁷ Finally, the probation officer has a reporting duty, which is the duty to “report regularly to the [local] magistrate on the progress of his task, and shall refer to him in case of difficulty.”⁷⁸

The general obligations to which an offender on probation, like one under post-penal supervision and assistance, must comply with are⁷⁹:

- To establish his residence in a specified place;
- To report when summoned by the probation officer;
- To receive visits from the probation officer and provide him with information and documents for verification of his means of support;
- To inform the probation officer in advance, and explain the reasons to him, of any change of employment or residence;
- To inform the probation officer in advance of any absence of over fifteen days, and inform him of his return; and
- To obtain the prior permission of the authority in charge before any departure abroad.

The court may additionally impose on the offender on probation one or more special obligations⁸⁰, just like the offender under post-penal supervision and assistance. The offender on probation may be required:

- To take up residence in one or more specified places;
- To stay away from specified places, unless he has obtained special or temporary permission to be there;
- To remain in employment or follow a course of instruction or vocational training;
- To submit to measures of control or of treatment, including treatment in hospital, and in particular with a view to curing an addiction to alcohol or drugs;
- To contribute to the family expenses, or to pay regularly any maintenance due from him;
- To compensate any damage caused by his offence;

⁷⁶ Section 59(1).

⁷⁷ Section 59(2).

⁷⁸ Section 59(3).

⁷⁹ Section 41.

⁸⁰ Section 42.

- To refrain from driving any class of motor vehicle, defined in terms of the classification in force for the purpose of driving licences;
- To avoid specified places, such as bars, race-courses, gaming-houses;
- To abstain from undue consumption of alcohol;
- To avoid the company of specified offenders, in particular his co-offenders or the accessories to the offence;
- Not to wager;
- Not to receive or lodge specified persons at his residence.

The general and special obligations are a mixed bag of varied requirements: residential, information, travel, employment, alcohol-drug treatment, prohibited activity, and so on.

The law governing probation has been in the Penal Code since 1967. It was borrowed from the Criminal Procedure Ordinance, itself influenced by the probation of the English sentencing system with its dominant ‘welfarist’ approach. Probation, like a number of other accessory penalties and of preventive measures in the Code, was stillborn in this country. It has never had credibility in the eyes of both the courts and the public. There is no probation service and the necessary enforcement infrastructure is simply absent. The Code provisions on probation are a dead letter.

§2. Remission

Remission of sentence means to reduce its term or to cancel it altogether. Sentence may be remitted either by release on licence⁸¹, release on parole, or by the grant of a pardon⁸², all three of them being executive measures. The head of state may grant or revoke release on licence; and he may remit enforcement of sentence by granting a pardon. The effect of these measures is to shorten the time served in prison.

Given the fact that imprisonment is over-used in this country and that prisons are literally bursting at the seams, remission of sentence if judiciously used could be a welcome strategy for decongesting prisons. Unfortunately, courts in this country notoriously impose long jail terms without considering the fact that prisons population already exceed the capacity of prisons. This does not help things very much. What is more, no resettlement programmes

⁸¹ Section 61.

⁸² Section 66.

for released prisoners are in place or are being developed, in order to address problems such as unemployment, addiction and so on.

Release on licence. In broad terms, a prisoner is released on licence (i.e., formally exempted from further service of the term of imprisonment) after serving half his sentence⁸³ or two-thirds of his sentence in some cases.⁸⁴ When that happens the person is said to be on early release or on parole. However, during release on licence and until the expiry of the full term of the prison sentence, a parolee is subject to recall at any time if he is in breach of any of the general or special conditions of his early release. Until the expiry of the full term of imprisonment to which he was sentenced, the prisoner's early release from prison may be revoked by executive decree at any time for breach of any of the conditions for his licence, and he is then taken back to prison. Release on licence when not revoked remains in force until the end of the period for which the offender was sentenced to imprisonment, at which point the release on licence becomes definitive.⁸⁵

By s. 61(1) of the Penal Code, release on licence means the premature release of a person sentenced to imprisonment, whether as a penalty or as a preventive measure. The grant and revocation of early release is by executive measure after consultation with a committee set up for that purpose.⁸⁶ The function of the committee is somewhat analogous to that of the parole board in other jurisdictions. Release on licence not revoked becomes definitive on expiry of the term of the sentence.⁸⁷ The governor of any prison may of his own motion recommend the release on licence of any prisoner not debarred by law and whose efforts to reform himself, whose work, and whose behaviour in custody have all been entirely satisfactory. Such governor is bound to forward to the executive through the Minister for Justice, any application by a prisoner not debarred by law from release on licence. Release on licence only suspends the enforcement of the sentence⁸⁸; it does not expunge the conviction.

It is granted only when sentence has been partly served – half the sentence in the case of a principal penalty, two-thirds of the sentence where sentence is aggravated by the fact of being a public servant, and five years of the sentence in the case of preventive detention.⁸⁹ Release is not automatically earned after

⁸³ Section 63(1).

⁸⁴ Section 63(2).

⁸⁵ Section 61(4).

⁸⁶ Section 61(2).

⁸⁷ Section 61(4).

⁸⁸ Section 62.

⁸⁹ Section 63.

serving the relevant period. Reaching the one-half or the two-thirds or the five-year point, as the case may be, only means that the prisoner becomes eligible for release. The release has to be recommended or applied for and granted. The grant of release on licence is made by the executive, which may also revoke it. Release is revocable on conviction for subsequent commission of a felony or misdemeanour or for breach of any of the general or special conditions of the licence that may have been set.⁹⁰ For example, the prisoner may be subjected to supervision on licence until the expiry of the full nominal sentence.

When release on licence is revoked the offender is taken back to prison where he then has to serve his full sentence, the period during which he was at liberty being disregarded in the calculation of the duration of his term. Thus, if a prisoner is released while he still has three years of his sentence to serve and his release is revoked after two years, he will then have to serve the whole three years; if he had behaved himself for one more year the release would have become irrevocable. The court, and not the executive, as in the case of release on licence may, by recording its reasons for doing so, suspend or revoke any post-penal measure.⁹¹

Pardon. The prerogative of pardon is constitutionally entrusted to the State President and in exercising that prerogative he is subject to no rules. Pardon is defined in section 66 as “the commutation or remission, in whole or in part and with or without conditions, of a penalty or preventive measure or of the obligation of a probation order.” Thus, a pardon may apply equally to penalties, to measures and to the analogous obligations of probation.

A pardon may take the form of commutation (i.e., the substitution of one penalty for another) or of remission (i.e., the reduction of a sentence to one less severe but without varying its nature). However, a pardon affects only the sentence passed and not the conviction. It remits the penalty but does not expunge (wipe off) the conviction. The beneficiary of the pardon still has a criminal record. Remission of a penalty may be partial or total. Both remission and commutation may be subject to conditions. The conditions are determined by the State President in his capacity as grantor of pardons. In the event of breach of the stipulated conditions, the pardon granted automatically lapses.

⁹⁰ Section 64.

⁹¹ Section 65.

Prescription and death. Prescription⁹² and death⁹³ constitute barriers to the enforcement of a penalty. Regarding prescription, a final sentence for a felony, a misdemeanour, or simple offence that has remained unenforceable for 20, 5, and 2 years respectively, may no longer be enforced.⁹⁴ Time does not begin to run, or time is suspended if it has begun to run, where sentence cannot be enforced due to any consideration of law or of fact independent of the offender's will⁹⁵. The prescription period will thus not begin to run or, if already running will be suspended, for example, during enemy occupation of all or part of the country; or during a national disaster caused by flood, fire, earthquake, tsunami, civil commotion, catastrophic weather conditions, or an epidemic). Prescription is, of course, a matter of expediency rather than of pure justice. As a practical matter a time comes when it is best to clean the slate of penalties which have been too long outstanding without being served and which no longer have much importance from the point of view of crime prevention.

The concept of prescription within the meaning of section 67 is concerned with the enforceability of sentences already passed. It has nothing to do with time limits for prosecuting an offence. In terms of section 67(3), where an offender is arrested during the relevant prescription period (20, 5, or 2 years, as the case may be) the question of prescription no longer arises. The offender will begin to serve his sentence as from the date of his arrest. If he subsequently escapes from lawful custody, then, for the purpose of computing the prescription period, time once again begins to run from the date of his escape without reference to the previous period during which he withdrew himself from serving his sentence. A convicted offender may decide to evade serving his sentence by remaining at large for the duration of the relevant prescription period. Such a person would be trying to be too clever by half. He would forfeit the chance held out to persons convicted in their absence to move the court to set aside the judgment. While the effect of his being at large throughout the relevant prescription period is that the sentence against him can no longer be enforced, nevertheless, the conviction recorded against him remains in his criminal record. The sentence against him counts as a previous conviction, though the offender is not shut out from applying for rehabilitation at the expiry of the relevant period after which such an application may be made.⁹⁶

⁹² Section 67.

⁹³ Section 68.

⁹⁴ Section 67(1).

⁹⁵ Section 67(2).

⁹⁶ Sections 70 (4) and 71 (3).

Death constitutes an insurmountable obstacle to the enforcement of a custodial sentence. It follows from the tenor of section 68 that an offender's death only prevents the enforcement of a custodial sentence that was passed on him. The death of the offender does not prevent the enforcement of a monetary sentence against his estate. It does not prevent the enforcement of any order of confiscation that was made against him. It does not prevent the enforcement of an order of closure of establishment. However, with regard to a monetary sentence the representatives of the deceased are only liable to the extent of the value of the deceased's estate.

Expungement of Conviction

To expunge means to remove or efface all traces of something. In relation to criminal justice it means to wipe clean an offender's criminal record. There is a complete *tabula rasa* and the person is restored to the *status quo ante* as if he never had a conviction. The conviction recorded in the offender's criminal record is struck out or wiped off. It disappears. It neither counts as a previous conviction, nor towards preventive confinement, nor as a disqualification from being granted a suspended sentence. The effect of expungement is, theoretically speaking, to put the offender back in the position which he would have occupied if he had not been convicted. There is restoration to a pre-existing position, *restitutio in integrum*, to borrow a contract law Latinism that expresses a remedy open to a misrepresentee who opts to rescind the contract.

There are three ways in which a conviction may be expunged. First, a conviction followed by a suspended sentence may be expunged if there is no reoffending within the suspension period. Second, if an offender is given a suspended sentence and he commits no offence within the operational period of the suspension (which must be within 3 to 5 years), then, at the expiry of that period the conviction which earned him the suspended sentence will be expunged.¹ This point has already been discussed in the previous chapter. Third, a conviction may also be expunged by rehabilitation² as well as by amnesty³. These two matters will be the focus of this brief chapter.

Section 1. Rehabilitation

The form of rehabilitation under consideration in this section differs from rehabilitation as a rationale for sentencing. Rehabilitation here presupposes that the penalty has been enforced. It may be automatic after lapse of a specified time, or it may be by court order after a certain time lapse also. In either case, rehabilitation expunges a conviction for a felony or a misdemeanour and puts an end to any accessory penalty and preventive measure, but does not relieve from confinement in a health institution and closure of an establishment.⁴ If a person is the subject of more than one

¹ Section 54 (4) as read with section 69.

² Sections 69-72

³ Section 73.

⁴ Section 69(1).

conviction he may not be rehabilitated only in respect of a single conviction. If he must be rehabilitated then the rehabilitation must be in respect of all the convictions recorded against him.⁵

To qualify for rehabilitation whether automatically or by court order the offender must have served any principal penalty of loss of liberty and paid all fines, subject to any remission and to prescription. Rehabilitation is possible only where all principal penalties have been served out, or have become time barred, or remitted by pardon. It is also necessary that in every case costs due to the Treasury (government department in charge of finance) in respect of the proceedings resulting in conviction should have been discharged and all sums under any civil judgment given in the criminal proceedings paid.⁶

There are a number of restrictions on the effect of rehabilitation. Rehabilitation does not affect the right of the Treasury to any sums already collected in satisfaction of civil judgment, expenses, fines or confiscations. Such sums cannot be refunded. Further, rehabilitation does not of itself entail the restoration of any decoration or any order (a national or foreign honour awarded) that was forfeited. It does not of itself entail restoration to any public service employment or office. It gives no right to restoration to any position in a public service which, but for the conviction, would have been attained.⁷

The rehabilitation of the convicted person is no bar to any application for revision of conviction he may be entitled to make with a view to establish innocence in fact.⁸ This is important because it is always possible that a person convicted and then rehabilitated may one day be in a position to produce evidence of his innocence. He may then apply for revision of the judgment even after he has been rehabilitated.

§1. Automatic rehabilitation

An offender is automatically rehabilitated upon application if during the relevant prescribed period he does not suffer any further reconviction and sentence.⁹ An offender sentenced to a fine and who pays it is automatically rehabilitated if he suffers no custodial sentence for felony or misdemeanour during a period of 5 years. An offender given a single custodial sentence of up to 6 months is automatically rehabilitated if after serving his sentence he suffers no further custodial sentence for felony or misdemeanour within a period of 10 years.

⁵ Section 69(2).

⁶ Section 69(3)(4).

⁷ Section 69(5)(6).

⁸ Section 69(7).

⁹ Section 70.

An offender given a single custodial sentence of up to 2 years is automatically rehabilitated if after serving his sentence he suffers no further custodial sentence for felony or misdemeanour within a period of 15 years. An offender given a single custodial sentence of up to 5 years is automatically rehabilitated if after serving his sentence he suffers no further custodial sentence for felony or misdemeanour within a period of 20 years. For this purpose, sentences ordered to run concurrently are counted as a single sentence.

Where an offender dies just after the relevant prescribed period has expired, his spouse or other relative of his is eligible to apply for rehabilitation of the deceased within one year of his death.¹⁰ At the expiry of the relevant period and if there was never any reconviction and sentence, the offender is automatically rehabilitated on application. In the case contemplated here, however, the offender is dead and rehabilitation might be thought pointless. Nevertheless, his family may derive moral satisfaction in seeking for rehabilitation in the interest of the memory of the deceased. If the offender had, before his death, already filed an application for his rehabilitation the family may revive or continue it; if he had not, the family may lodge such an application.

§2. Court-ordered rehabilitation

In the case of a single sentence of more than five years or several sentences totalling more than two years, automatic rehabilitation is no longer available. It may only be granted by order of the High Court¹¹ on application made to it by the offender. An offender may apply to the court for rehabilitation from a conviction for felony after 5 years or from a conviction for misdemeanour after 3 years.¹² The offender may lodge his application only after serving the sentence in respect of the offence for which he was convicted and, additionally, a period of 5 or 3 years, as the case may be, has elapsed, during which he did not reoffend. The 5 or 3-year period is computed from the date of release from prison, or of payment in the case of fine.¹³ For an offender sentenced after taking into account his previous conviction as aggravating factor¹⁴, or who has avoided enforcement of his sentence so as to benefit from prescription, the periods become 10 years for felony and 6 years for misdemeanour.¹⁵

¹⁰ Section 72.

¹¹ Section 71.

¹² Section 71(1).

¹³ Section 71(2).

¹⁴ Section 88.

¹⁵ Section 71(3).

Even after the death of the offender his spouse, ascendant or descendant may revive or present an application for his rehabilitation after one year of the death.¹⁶

Section 2. Amnesty

This section deals with amnesty for ordinary offences, often granted on certain anniversaries, celebrations, or historic event. It is not concerned with amnesty for political offences or with amnesty as a human right, ‘the right of oblivion’.

§1. Historical

Historically, amnesty is an outgrowth of the right of pardon. Pardon itself is an act of individual clemency. Both amnesty and pardon appear to have been measures meant to remedy the imperfections of the criminal justice system and to ensure a measure of social peace. Amnesties were invoked in relation to breaches of the laws of war and were reciprocally implemented by opposing sides in an international armed conflict. The impact of the two world wars in the first half of the twentieth century, however, had considerable implications not only for the use of amnesties, but also for their legality under international law. The scale of World War I precipitated a new phase of unilateral amnesty for the victors and prosecutors of World War I criminals for the defeated aggressor states. This precedent was followed after the Second World War with the establishment of the first international criminal court, the International Military Tribunal at Nuremberg. However, the horrors perpetrated during that War also prompted the development of a branch of international law, international humanitarian law, aimed at recognising and protecting human rights in an attempt to prevent such atrocities being repeated.

§2. Meaning and effect of amnesty

Amnesty is a sovereign act of oblivion for past acts. It provides immunity or protection from punishment and presupposes a breach of law. It is granted by a government to all persons (or to certain persons) who have been found guilty of crime(s) specified in the amnesty law. It eliminates, *ex post facto*, the legal basis of the offence. The conduct of the person granted amnesty is fictionally deemed not to have constituted an offence and the penalty is considered never to have been enforced, even though the beneficiary of the

¹⁶ Section 72.

amnesty may have been convicted, sentenced and served his sentence. The Penal Code provides that amnesty expunges a conviction and bars the commencement or continuation of any prosecution.¹⁷ An amnesty may be granted to take effect before or after a conviction. It may be directed at the offender personally, at the offence itself, or at both.

Section 73 enacts:

“(1) Without prejudice to any civil right, an amnesty shall expunge a conviction and shall put an end to the enforcement of all penalties, whether principal or accessory, and of all preventive measures pronounced in consequence of the conviction, save confinement in a health institution and closure of an establishment.

(2) Unless otherwise expressed, an amnesty shall bar the commencement or continuation of any prosecution.

(3) Unless so expressed, an amnesty shall not relieve of the liability for any expenses due to the Treasury in respect of a conviction which has become final.

(4) Unless so expressed, it shall not affect the right of the Treasury to any sums already collected in satisfaction of expenses, fines or confiscation.

(5) Unless so expressed, it shall of itself neither restore any decoration nor restore to any order forfeited.

(6) Unless so expressed, it shall not of itself restore to any public service, employment or office, and shall give no right to restoration to the position in a public service which, but for the conviction, would have been attained.

(7) It shall be no bar to an application for revision with a view to establish innocence in fact.”

Constitutionally, amnesty may only be granted by statutory enactment. The reason for this appears to be that since it is parliament that defines felonies and misdemeanours and determines the penalties attaching to them, procedural parallelism dictates that amnesty be granted only by a law enacted by the legislature. The role of the courts, unlike in the case of rehabilitation, is usually only secondary. The court becomes involved *a posteriori*, determining on a case-by-case basis the applicability of the amnesty law.

¹⁷ Section 73(2).

§3. Amnesty, pardon and rehabilitation distinguished

Amnesty and pardon are distinct legal concepts and should not be confused. Amnesty is the abolition and forgetfulness of the offence. It expunges a conviction. Pardon is mere forgiveness of the offence. It applies only to the sentence and does not affect the conviction. An 'amnesty' that does not expunge the conviction is in fact not an amnesty at all; it is only a pardon.

Amnesty also differs from rehabilitation in important respects. Rehabilitation is possible only where all principal penalties have been served out, time-barred, or remitted by pardon. An amnesty may, on the contrary, take effect at any time, even before conviction. Rehabilitation may be automatic or by court order and always requires a prescribed time to have elapsed. An amnesty is granted by law and its effect is that it obliterates the conviction from the date set out in the amnesty law. Rehabilitation operates in favour of the person of the offender only. That is why a person who has several convictions cannot be rehabilitated only in respect of some of those convictions but must be rehabilitated, if he must, in respect of all those convictions. An amnesty, by contrast, may operate in favour of the offender personally, or the offence which he has committed, or in favour of both the offence and the offender.

An amnesty serves a useful purpose. It serves in some ways as a corrective measure against the imperfections of the criminal justice system. It facilitates the reintegration into society of the person benefiting from it. It contributes to decongestion of overcrowding in prisons, especially when amnesty laws are promulgated at regular intervals and used for humanitarian purposes covering, for example, small-time offenders, disabled persons, incurable or chronically ill prisoners, the aged and the sick, pregnant women, juveniles, and mothers of very young children.

Bibliography

- African Human Rights Commission, *Study on the Question of the Death Penalty in Africa*, Baobab Printers, Banjul, 2012.
- Ajibola B, 'Schemes Relating to Mutual Assistance in Criminal Matters and the Control of Criminal Activities within Africa – Nigeria's Experience,' *Integration of the African Continent through Law*, Edward Foakes Publishers, Lagos, 1990.
- Akande D, 'International Law Immunities and the International Criminal Court,' (2004) 98(3) *American Journal of International Law* 407-433 at 413.
- Allen MJ, *Textbook on Criminal Law*, Blackstone, London, 1991.
- Allott AN, *New Essays in African Law*, Butterworths, London, 1970.
- Anderson J, 'Sentencing and the Unlikely Scholar,' *The Newcastle Law Review*, 2005-6, volume 9.
- Andrews W, *Old Time Punishments*, Dorset Press, New York, 1991.
- Anyangwe C, 'Emerging African Jurisprudence Suggesting the Desirability of Abolition of Capital Punishment,' *African Journal of International and Comparative Law* 23.1 (2015): 1-28.
- Anyangwe C, 'Parliamentary Democracy and Constitutional Democracy,' *Zambia Law Journal*, 1998, p. 94
- Anyangwe C, 'The Zambian Constitution and the Principles of Constitutional Autochthony and Supremacy,' vol. 29, *Zambia Law Journal*, 1997, p. 1.
- Anyangwe C, *An Outline of the Study of Jurisprudence*, University of Zambia Press, Lusaka, 2005.
- Anyangwe C, *Criminal Law in Cameroon – Specific Offences*, Langaa, Bamenda, 2011.
- Anyangwe C, *The Cameroonian Judicial System*, CEPER, Yaoundé, 1989.
- Anyangwe C, *The Magistracy and the Bar in Cameroon*, CEPER, Yaounde, 1983.
- Ashworth A, *Principles of Criminal Law*, Oxford University Press, Oxford, 1991.
- Ashworth A, *Sentencing and Criminal Justice*, Cambridge University Press, Cambridge, 2005.
- Barnes HE et al, *New Horizons in Criminology*, Prentice Hall, 1959.
- Barnes HE, *The Story of Punishment: A Record of Man's Inhumanity to Man*, Montclair, New Jersey, 1972.
- Bouzat et Pinatel, *Traité de Droit Pénal et de Criminologie*, 3 vol., Dalloz, Paris, 1975.
- Boyle K & Allen M, *Sentencing Law and Practice*, Sweet & Maxwell, London, 1986.

- Brownlie I, *Principles of Public International Law*, Oxford University Press, Oxford, 2003.
- Burchell JM, *Principles of Criminal Law*, Lansdowne, Juta, 2005.
- Card R, *Criminal Law*, Butterworths, London, 1995.
- Cassese A, 'The proper limits of individual responsibility under the doctrine of joint criminal enterprise,' (2007) 5 *Journal of International Criminal Justice* 109.
- Cassese A, Amicus curiae brief of Professor Antonio Cassese and members of the Journal of International Criminal Justice on joint criminal enterprise, Case File No. 001/18/07-2007-ECCC/OCJ (PTC 2), 27 Oct 2008 <http://antoniocassese.com/italiano/reports>
- Cassese A, *International Criminal Law*, Oxford, OUP, 2008.
- Cecil Turner JW, *Russell on Crime, volume 1*, Stevens & Sons, London, 1964.
- Clarence Smith JA, 'The Cameroon Penal Code: Practical Comparative Law,' 17 *International and Comparative Law Quarterly* 651 (1968).
- Conklin JE, *Criminology*, Macmillan, New York, 1981.
- Cross R & Tapper C, *Cross on Evidence*, 6th ed., Butterworths, London, 1985.
- Cross R, *Punishment, Prison and the Public*, Stevens & Sons, London, 1971.
- Dias RWM, *Jurisprudence*, 5th ed., Butterworths, London, 1985.
- Ehrlich, 'The Deterrent Effect of Criminal Law Enforcement,' 1 *J. Leg. Stud.* 259-276 (1972).
- Elias TO, *The Nature of African Customary Law*, Manchester University Press, Manchester, 1956.
- Enonchong HNA, *Cameroon Constitutional Law*, CEPER, Yaoundé, 1967.
- Fitzgerald PJ, *Criminal Law and Punishment*, Oxford University Press, Oxford, 1962.
- Friedman W, *Law in a Changing Society*, Universal Law Publishing, Delhi, 2003.
- Fuller L, *The Morality of Law*, Yale University Press, 1969.
- Haag van den, 'Punishment as a Device for Controlling the Crime Rate,' 33 *Rutgers L. Rev.* 706, 718-719 (1981)
- Haan V, 'The development of the concept of joint criminal enterprise at the International Criminal Tribunal for the Former Yugoslavia,' (2005) 5 *International Criminal Law Review* 167.
- Hall J, *General Principles of Criminal Law*, 2nd ed., Indianapolis: The Bobbs-Merrill Co., 1960 (reprinted in 2010 by The Lawbook Exchange, Ltd).
- Hall Williams, *Criminology and Criminal Justice*, Butterworths, London, 1982
- Hart HM, 'The Aims of the Criminal Law,' 23 *Law and Contemporary Problems* (1958), p. 405.
- Herzog JB, 'Le Projet de Code Pénal Fédéral du Cameroun,' *Revue Science Criminelle et Droit Pénal Comparé*, No. 1, 1965, p. 212.
- Heydon JD, *Evidence Cases and Materials*, 2nd ed., Butterworths, London, 1984

- Hoebel EA, *The Law of Primitive Man*, Harvard University Press, 1964.
- Home Office, *The War against Crime in England and Wales*, Cmnd 2296, HMSO, London, 1965.
- Karlen D, *The Anglo-American Criminal Justice*, Oxford University Press, Oxford, 1967.
- Köneke Vanessa, *Retributive Justice: Psychology of Justice*, Grin Verlag, 2011.
- Landa J & Ramjohn M, *Unlocking Evidence*, Hodder, London, 2009.
- Leigh LH, 'Sado-masochism, Consent, and the Reform of the Criminal Law,' *The Modern Law Review*, vol. 39, 1976, p. 13
- Lloyd L & Freeman MDA, *Lloyd's Introduction to Jurisprudence*, 5th ed., Stevens & Sons, London, 1985.
- Loewy AH, *Criminal Law in a Nutshell*, West Publishing, St. Paul, Minnesota, 1975.
- Lofton J, *Justice and the Press*, Beacon Press, Boston, 1966.
- MacDonald JHN, *A Practical Treatise on the Criminal Law of Scotland*, Green & Son, London, 1980.
- Martin J & Storey T, *Unlocking Criminal Law*, 3rd ed., Hodder, London, 2010.
- McLean D, 'Scheme of Mutual Assistance in Criminal Matters,' *Integration of the African Continent through Law*, Edward Foakes Publishers, Lagos, 1990.
- Mensah-Brown AK, *Introduction to Law in Contemporary Africa*, Conch, New York, 1976.
- Merle R & Vitu A, *Traité de Droit Criminel*, Tome I, Cujas, Paris, 1988.
- Middleton & Tait, *Tribes without Rulers*, Routledge & Kegan Paul, London, 1958.
- O'Shea A, *International Law and Organization*, Butterworths, Durban, 1998.
- Okonkwo & Naish, *Criminal Law in Nigeria*, Sweet & Maxwell, London, 1980.
- Okonkwo C O (ed.), *Introduction to Nigeria Law*, Sweet & Maxwell, London, 1980.
- Parant R, Gilg R and Clarence Smith JA, 'Le Code Pénal Camerounais – Code Africain et Franco-Anglais,' *Revue Science Criminelle et Droit Pénal Comparé*, 1968, p. 339
- Posner R, *Economic Analysis of Law*, 3rd ed., Little Brown & Co., Chicago, 1986 (9th ed. by Wolters Kluwer & Business, 2014).
- Pradel J, *Droit Pénal*, Cujas, Paris, 1976.
- Ralph CH, *Common Sense about Crime and Punishment*, New York, 1961.
- Reid ST, *Crime and Criminology*, 5th ed., Holt, Rinehardt & Winston, New York, 1988.
- Rudin HR, *Germans in the Cameroons 1884-1914. A Case Study in Modern Imperialism*, Greenwood Press, New York, 1968.
- Sawer G, *Law in Society*, Oxford University Press, Oxford, 1965.

- Schabas WA, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, OUP, 2010.
- Shaw MN, *International Law*, Cambridge University Press, Cambridge, 1997
- Shearer IA, *Starke's International Law*, Butterworths, London, 1994.
- Smith & Hogan, *Criminal Law – Cases and Materials*, Butterworths, London, 1980.
- Smith & Hogan, *Criminal Law*, 7th ed., Butterworths, London, 1992.
- Smith SA, 'Contracting under pressure: a theory of duress,' (1997) 56 *Cambridge L.J.* 343
- Snyman CR, *Criminal Law*, Butterworths, Durban, 1995
- Stefani G, Levasseur G & Bouloc B, *Droit Pénal Général*, Précis Dalloz, Paris, 1992.
- Stefani, Levasseur et Jambu-Merlin, *Criminologie et Science Pénitentiaire*, Dalloz, Paris, 1976.
- Stephen Sir JF, *A History of the Criminal Law of England*, 3 volumes, 1883.
- Thomas DA, *Principles of Sentencing*, London: Heinemann 1979.
- Turner JWC, *Kenny's Outline of Criminal Law*, 19th ed., Cambridge University Press, Cambridge, 1966.
- United Nations Office for Drug Control and Crime Prevention, *UPDATE*, Special Edition, April 2000.
- Van Sliedregt E, 'Joint criminal enterprise as a pathway for convicting individuals for genocide,' (2007) 5 *Journal of International Criminal Justice* 184.
- Walker, *Sentencing – Theory, Law and Practice*, Butterworths, London, 1985.
- Williams G, *Criminal Law – The General Part*, Stevens & Sons, London, 1961.
- Williams G, *Textbook of Criminal Law*, Stevens & Sons, London, 1978.
- Williams G, *The Mental Element in Crime*, Goldberg's Press, Jerusalem, 1965.
- Wooton B, *Crime and the Criminal Law*, Sweet & Maxwell, London, 1981.
- Zedner L., 'Reparation and Retribution: Are They Reconcilable?' 1994 *Modern Law Review*, 57: 233

Index

A

Abandonment 393
Abetment 336
Abortion 6
Accessory (meaning) 336
Accessory after the fact 343, 344
Accessory at the time of the fact 340
Accessory before the fact 337
Accessory penalties 449
Accessory to the preparation of a crime 345
Accident 279, 280, 281, 282
Act 182, 227, 228
Actio libera in causa 271
Active nationality principle 139
Actus reus 96, 175, 176
Adultery 8
Adultery-in-his-heart 227
Advertent negligence 222
Advocatus 21
Affective 250
African Charter on Human and Peoples' Rights 62
Aggravation 500
Aids to interpretation 91
Alcohol 269
Alcoholism 14
Alter ego 405
American Convention on Human Rights 62
Amnesty 518-520
Ancel, Marc 40, 41
Ancillary 309
Antiquity 11
Apology 423
Association des malfaiteurs 381

Asylum 171
Attempt 357, 358, 360 et seq., 367
Attempted abetment 394, 396
Attempting the impossible 375
Authoritarian state 14
Automatism 258, 283, 285, 286
Autrefois acquit 154, 168
Autrefois convict 154, 168

B

Ban on pursuing occupation 457
Bases for punishing complicity 353
Beccaria, Cesare 27-31, 59, 60
Bentham, Jeremy 27, 31-32
Bestiality 7
Biological causes of crime 37
Blameworthy 251, 252, 261, 262, 263
Blasphemy 8, 17
Branding 5

C

Calculation of sentence 497, 499
Carelessly 214, 218
Cartographic school 34-35
Case stated 79, 81, 82, 83, 84
Causation 235
Chain conspiracy 388
Charge (meaning, drafting) 102-117
Charles Darwin 37
Charles Lucas 33
Children 273, 274
Circumstances (surrounding) 234
Classical school 27
Classification of offences 93
Closure of premises 452

Code of Hammurabi 11, 17
 Code of the Hittites 11
 Code Pénal 10
 Codification 51-55
 Cognitive 249
 Collective reprisals 15
 Colonial period 44-50
 Combination theory of punishment 424
 Commencement of sentence 497
 Common criminal purpose 331
 Compensation 16, 17, 424, 438, 439
 Complex crimes 94
 Complot 381
 Compulsion 283
 Conative 250
 Concurrence (physical and mental elements) 237
 Concurrent sentences 481, 484
 Concussion 256
 Conduct crimes 94
 Confinement 456, 457, 458
 Confiscation 436, 437
 Confiscation of property 452, 453, 454, 459
 Consecutive sentences 481, 495
 Consequence 235
 Consequentialist 427
 Conspiracy 357, 358, 381 et seq.
 Conspiracy 381
 Constitution 71, 72
 Construction of criminal statutes 69
 Contemporaneity 238
 Continuing crimes 95
 Contra proferentem 92
 Corporate criminal liability 399, 401, 403, 404
 Corpus delicti 479
 Count Grammatica 39
 Crime (definition) 4, 6
 Crime (phenomenon) 10
 Crimes mala in se 101, 263
 Crimes mala prohibita 101
 Crimes of commission 93
 Crimes of omission 93
 Crimes under international law 73, 74, 75, 76, 144
 Crimes under the Rome Statute 9, 75, 76
 Criminal Code 10
 Criminal disposal 421
 Criminal law (branch of law) 9, 10
 Criminal law justice (history) 15 et seq.
 Criminal procedure 11, 12
 Criminal responsibility 180
 Criminal trajectory 357, 358
 Criminalisation 3, 4, 5, 14
 Criminalistics 12
 Criminology 3, 11, 12, 13, 14, 35
 Curia advisari vult 461
 Custom 43
 Customary international law crimes 9, 73, 74, 143, 144
 Customary legislation in Africa 19
 Customs offences 100

D

Damages 11
 Dangerous preparations 394
 Death sentence 447, 448, 449
 Declaration of the Rights of Man and the Citizen 60
 Defence of property 298
 Defences (two broad types) 243, 247
 Delegation 410, 411
 Delicta juris gentium 143
 Delirium tremens 272
 Dementia 272

Demurrer 83
 Deterrence 427, 428, 429, 430
 Discretion 461, 462, 470
 Dishonestly 224, 225
 Doli incapax 274
 Dolus 181
 Draco's code 18
 Drug addiction 14
 Drunkenness 8
 Dualist state 73
 Dubious prosecutorial practices 463
 Duplicity 106
 Duress 310, 311

E

Ejusdem generis 91
 Endogenous factors of crime 13
 Epilepsy 253, 254, 284
 European Convention for the
 Protection of Human Rights 62,
 68
 Euthanasia 6
 Events 234
 Evidential burden 243
 Ex post facto legislation 59, 61, 62,
 129
 Exclusivity of municipal criminal law
 152
 Excuse 244
 Execution of the law 246
 Exogamic factors of crime 14
 Expiation 427
 Expressio unius 91
 Expungement of conviction 515
 Extensive construction 410
 Extradition 164-171
 Extraterritorial jurisdiction 138

F

Falsely 224, 225
 Felony (definition) 97
 Ferri, Enrico 33, 36, 37, 38
 Fine 442, 443, 472
 Foreign criminal judgments 153, 155
 Forensics (forensic science, forensic
 pathology) 12
 Foreseeable circumstances 350
 Foreseeable consequences 351
 Forfeiture 436, 437, 449
 Forum conveniens 131
 Fraudulently 224, 226

G

Gambling 8
 Garofalo, Raffaele 13, 33, 36, 38
 General deterrence 65
 Golden rule 88, 89
 Guerry, André Michel 34, 35
 Guideline judgments 465
 Guizot 33

H

Hebrew laws 11
 Heresy 8, 17
 Homosexuality 5, 8
 Human rights 5, 8
 Hypoglycaemia 256, 260

I

Ignorance of the law 203
 Ignorantia juris non excusat 67
 Impossibility of fact 376
 Impossibility of law 376
 Imprisonment 445

In limine litis 84
 In loco parentis 275, 309
 In personam 437, 438
 In rem 437
 Inadequacy of means or methods 376
 Inadvertent negligence 223
 Incapacitation 431
 Incest 8
 Inchoate 357, 358, 359, 381
 Individualisation of sentence 479
 Infancy 308
 Initiatory jurisdiction 133
 Insanity 248, 249, 250, 258, 259, 263, 264, 265, 266, 268, 285, 307
 Instantaneous crimes 95
 Instigation 336, 337
 Intention 181, 184
 Intentional crimes 96
 International Convention on Civil and Political Rights 62, 68
 International Criminal Court 75, 76
 International criminality 157
 International law 72
 Interpol 160-163
 Interruption 391
 Intoxication 269, 308
 Italian school 35
 Iter criminis 358

J

Joint criminal enterprise 333
 Joint principal offenders (co-offenders) 329
 Judicial criminal legislation 65
 Judicial interpretation 85
 Judicial review 78
 Jury 22
 Jus cogens 144

Just desert 425
 Justification 244, 406

K

King Muh of China 18
 Kleptomania 259

L

Lacassagne, Alexandre 33
 Lawful authority 286
 Lawful defence 290, 292
 Legal revenge 425
 Less severe law 124, 125, 126
 Lex posterior derogat priori 73
 Lex talionis 17, 425
 Literal rule 86, 87, 88
 Locus classicus 148
 Locus criminis 320
 Lombroso, Cesare 13, 33, 36-38
 Lord Bacon 66

M

M'Naghten rules 251
 Magna Carta 61
 Mal (petit, grand) 254
 Mandamus 81, 83
 Medical expert (testimony) 264
 Medicine 13
 Mens rea 96, 175, 176, 177, 178, 179, 180, 181, 260, 270, 334
 Mental fault 175
 Mental illness 252, 254, 255
 Minima and maxima 467
 Mischief rule 89
 Misdemeanour (definition) 97
 Misjoinder 112
 Mistake of fact 208
 Mitigation 500, 502

Monist state 73
 Mosaic laws 18
 Motive 197
 Multiple convictions 481
 Mutual assistance in criminal matters
 163, 164

N

Narcotic drugs 270
 Nationality principle (passive) 141
 Natural life imprisonment 446
 Nazi Germany 68
 Necessity 299, 302
 Negligently 214, 215
 Nemo cogitationis poenam patitur
 357
 Neo-classical school 32-35
 New social defence school 40-41
 Non-intentional crimes 96
 Non-refoulement 172
 Non-retrospection 119
 Norms 3
 Noxa delivery up 16
 Nullum crimen, nulla poena sine lege
 59, 63, 64, 69
 Nuremberg 289

O

Objective test 368
 Offences (classification) 8
 Offences under the ordinary law 99
 Omission 182, 229
 Onus 266
 Ordinal proportionality 426
 Ortolan 33

P

Pardon 512, 520
 Parliament 65, 66, 71, 72, 73, 77
 Penal Code *passim*
 Penal law 9, 10
 Penalties 441, 442, 472
 Penology 11
 Persona non grata 149
 Personal jurisdiction 138
 Political offences 99
 Positivist approach 35-37
 Post-colonial period 50-55
 Pre-classical thinkers 27
 Pre-emptive defence 295
 Premeditation 189
 Preparation 358, 365, 367
 Prescription 513
 Presumptions 91
 Prevention 427
 Preventive measure 127, 441, 454
 Principal offenders 325, 327
 Principle of legality 29, 59, 60, 61, 63,
 64, 65, 66, 67, 68, 69, 70, 71, 93
 Principle of non-retrospection 68
 Prins 39
 Prison (old time) 25
 Probation 507
 Proportionality 296, 316, 317, 473-
 479
 Prosecutorial discretion 462, 463
 Prostitution 8
 Protective principle 142
 Provocation 312, 313
 Psychiatry 13
 Psychoanalysis 13
 Psychology 13
 Psychopaths 260
 Publication of judgment 452
 Punishment 11, 423, 425 et seq., 441

Punishment (early forms) 23, 24
Punishment (rationales) 423
Punishment for attempt 378

Q

Quételet 33, 34, 35
Qui peccat per alium peccat per se
409

R

Rashly 214, 220
Recognizance 455, 456
Reconciliation (criminal cases) 436
Re-education 9
Reformation 12, 39
Rehabilitation 9, 33, 39, 40, 41, 432,
515, 516, 517
Release on licence 511
Remission 503, 510
Rendition 171
Reoffending (recidivism) 427, 433
Res communis 138, 141, 142, 143
Res nullius 138, 142, 143
Re-socialisation 9, 39
Respect 310
Respondeat superior 404
Restitution 436
Restorative justice 424, 435
Result crimes 94
Retribution 12, 424, 425
Rolling conspiracy 388
Rossi 33
Rules of interpretation 86

S

Sado-masochist 5
Saleilles 39

Sanction 3, 12
Schizophrenia 252
Secondary offenders 325, 336
Self-control 323
Self-help punishment 15
Sentencing 461, 466 et seq., 481
Sexual orientation 7
Simple crimes 94
Simple offence (definition) 97
Social causes of crime 38
Social defence school 39
Sociology 13
Sociology of law 13
Sociopaths 260
Socius criminis 334
Sole principal offender 327
Somnambulism 256, 257, 258, 284,
285
Sources of law 71
Sources of sentencing law 464
Southern British Cameroons (English-
derived legal system) 44-51
Sovereign and diplomatic immunities
145-152
Soviet Union 68
Specific intent 191
Statistics 11, 34, 35
Strict liability 399, 412, 413, 415, 416,
417, 419
Subjective test 370
Sumerians 17
Superior orders 289
Supervision and assistance 458
Suspended sentence 444
Suspension 503, 504

T

Tarde, Gabriel 33
Tattooing 5

Tax offences 100
 Taxonomy 93
 Teleological approach 90
 Term of sentence 481
 Terminatory jurisdiction 133
 Terra firma 132
 Territorial principle 132, 135
 Territorial principle (objective) 133
 Territorial principle (subjective) 133,
 134
 Territoriality 131, 157
 Thought crime 227
 Threat 276, 277, 278
 Transferred intention 191
 Transnational organised crime 159
 Treaties 71, 72
 Tribunals (early) 20

U

Ulterior intention 190
 Ultra vires 79, 84, 287, 400
 Unequivocal test 370
 Unintentionally 212
 Universal Declaration of Human
 Rights 62
 Universal jurisdiction 74
 Universality principle 143
 Unlawful conduct 175

V

Verdict 267
 Vicarious criminal liability 399, 407,
 408, 409, 411
 Victimless crimes 5, 8
 Victimology 439
 Victims of crime (rights) 434
 Von List 39

W

Wheel conspiracy 388
 Workhouse 25

“This book fully complements Professor Carlson Anyangwe’s earlier book, Criminal Law in Cameroon-Specific Offences (2011). From an author who is incontrovertibly the leading Cameroon legal scholar with a rock-solid reputation for accuracy and reliability, it has a lot to commend. Exceptionally detailed, thorough and thoughtful, the author’s simple but engaging and lively writing style and clarity of expression guides the reader through complex details without any feeling of being overwhelmed. The book takes the reader through the historical development of criminal law generally, its reception in Cameroon and navigates with ease through topics such as its application, criminal responsibility, participation in crime and criminal disposition in a sublime manner that is accessible not only to experts, particularly comparatists interested in Cameroon’s bi-jural system, but also even the novice. This and the earlier book, without doubt, provide the definitive and most authoritative work on modern criminal law in Cameroon.”

**PROFESSOR CHARLES MANGA FOMBAD,
INSTITUTE FOR INTERNATIONAL AND COMPARATIVE LAW IN AFRICA,
UNIVERSITY OF PRETORIA, SOUTH AFRICA**

This is a comprehensive, insightful, lucid, intense and unrivalled text on the general part of the criminal law in Cameroon. Beginning with an account of the historical development of the criminal law generally, the author proceeds to analyse and discuss in detail the principles governing application of the criminal law, criminal responsibility, participation in crime, penalties, and sentencing. These principles are broadly the same in other jurisdictions. The book balances theoretical content with case-law illustrations to enhance readability, comprehension and assimilation. It is an invaluable source and essential reading for law students and teachers, and lawyers in private practice and government service.

CARLSON ANYANGWE is a graduate of London University, Professor of Laws, and currently the Rector, Butterworth Campus, Walter Sisulu University, South Africa. He is a Member of the African Human Rights Commission’s Working Group of Experts on the Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa. His recent law titles include: *Introduction to Human Rights and International Humanitarian Law* (2004); *An Outline of the Study of Jurisprudence* (2005); *Human Rights Law in Zambia – Documents, Cases and Materials* (two volumes) (2006); *Criminal Law in Cameroon – Specific Offences* (2011); and *Revolutionary Overthrow of Constitutional Orders in Africa* (2012). He is a rated researcher of the National Research Foundation (NRF) of South Africa.



**Langaa Research & Publishing
Common Initiative Group
P.O. Box 902 Mankon
Bamenda
North West Region
Cameroon**

ISBN 978-9956-762-78-1

